(14)

No. 84-648-CFX
Status: GRANTED

Title: Sedima, S.P.R.L., Petitioner
v.
Imrex Company, Inc., et al.

Docketed:
October 22, 1984

Court: United States Court of Appeals
for the Second Circuit

See also:
84-604
84-657
84-1222

Counsel for petitioner: Snitow, Franklin H.

Counsel for respondent: Eisenberg, Richard

Entry	Date	Note	Proceedings and Orders
1	Oct 22 1984	G	Petition for writ of certiorari filed.
2	Nov 21 1984		Brief amicus curiae of New York City filed. VIDED.
3	Nov 26 1984		Brief of respondents Imrex Co., et al. in opposition filed.
4	Nov 28 1984		DISTRIBUTED. January 4, 1985
5	Dec 5 1984		REDISTRIBUTED. January 4, 1985
7	Jan 7 1985		REDISTRIBUTED. January 11, 1985
8	Jan 14 1985		Petition GRANTED. The case is set for oral argument in tandem with No. 84-822, American National Bank v. Haroco, Inc. Justice Powell OUT.
			**********
9	Jan 25 1985		Application of the Attorney General of Arizona for leave to file a single consolidated amicus curiae brief, not
10	Jan 25 1985		to exceed 50 page, filed.
11	Feb 1 1985		DISTRIBUTED. Feb. 15, 1985. (Above application).
12	Feb 19 1985		The application of the Attorney General of Arizona for leave to file a consolidated brief as amicus curiae in
13	Feb 19 1985		excess of page limitation presented to Marshall, J., and by him referred to the Court denied. Powell, J., OUT.
14	Feb 26 1985		Record filed.
15	Feb 26 1985		Certified original record and C. A. proceedings received. (1 Box).
16	Feb 28 1985		Joint appendix filed.
17	Feb 28 1985		Brief of petitioner Sedima, S.P.R.L. filed.
18	Feb 26 1985		Brief amicus curiae of Suffolk, NY filed. VIDED.
19	Feb 28 1985		Brief amicus curiae of City of New York, et al. filed.
21	Feb 28 1985		Brief amicus curiae of Arizona, et al. filed.
22	Feb 28 1985		Brief amicus curiae of State of New York filed.
23	Mar 15 1985		SET FOR ARGUMENT. Wednesday, April 17, 1985. (2nd case).
24	Mar 22 1985		CIRCULATED.
25	Mar 29 1985	G	Motion of American Institute of Certified Public Accountants for leave to file a brief as amicus curiae filed.
26	Mar 29 1985	G	Motion of Alliance of American Insurers, et al. for leave to file a brief as amici curiae filed.
27	Mar 29 1985	X	Brief of respondents Imrex Co., et al. filed.
28	Mar 29 1985	G	Motion of Securities Industry Association for leave to file a brief as amicus curiae filed.
29	Apr 15 1985		Motion of American Institute of Certified Public Accountants for leave to file a brief as amicus curiae GRANTED.
30	Apr 15 1985		Motion of Alliance of American Insurers, et al. for

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No. 84-648-CFX

Entry	Date	Note	Proceedings and Orders
			leave to file a brief as amici curiae GRANTED.
31	Apr 15 1985		Motion of Securities Industry Association for leave to file a brief as amicus curiae GRANTED.
32	Apr 17 1985		ARGUED.

No. 84-648

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In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY, INC., JACOB ARMON and GIDON ARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Must a defendant be criminally convicted for committing predicate acts listed in 18 U.S.C. §1961(1) (1978) before a private litigant can sue under 18 U.S.C. §1964(c) (1970)?

2. Does standing to sue under 18 U.S.C. §1964(c) require an injury of the kind caused by mobsters?

3. Where a claim falls within the literal terms of a federal statute, clear on its face, is a federal court permitted to preclude prosecution of the claim by redrafting the statute in a manner that is unsupported by the statute's language or legislative history?

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No.

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY, INC., JACOB ARMON and GIDON ARMON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Sedima, S.P.R.L., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit filed on July 25, 1984.

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 741 F. 2d 482 (2d Cir. 1984), and is printed in the Appendix[1] hereto (App. 1a-59a). The decision of the United States District Court for the Eastern District of New York, dated November 16, 1983 and reported at 574 F. Supp. 963 (E.D.N.Y. 1983), is reproduced at App. 60a-64a.

JURISDICTION

The judgment of the Second Circuit Court of Appeals was entered on July 25, 1984. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) (1976).

STATUTES INVOLVED

Several provisions of the Racketeer Influenced and Corrupt Organizations Act, ("RICO") 18 U.S.C. §§1961-68 (1978) (as amended) (originally promulgated as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, §901(a), Oct. 15, 1970, 84 Stat. 941, and amended Pub. L. 95-575, §3(c), Nov. 2, 1978, 92 Stat. 2465; Pub. L. 95-598, Title III, §314(g), Nov. 6, 1978, 92 Stat. 2677) are reproduced at App. 65a-71a. For purposes of this petition, the most relevant provisions are:

18 U.S.C. §1961(1) (1978):

> "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic

1. For purposes of this petition, a number or numbers preceded by the abbreviation "App." shall constitute a reference to a specific page or pages in the Appendix.

> or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), ...

18 U.S.C. §1964(c) (1970):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT

Sedima, S.P.R.L. ("Sedima"), a Belgian corporation located in Brussels, is in the business of importing and exporting electronic, mechanical, and hydraulic components manufactured in the United States. These components are principally supplied to the aerospace and defense industries.

Imrex Company, Inc. ("Imrex"), a New York corporation, is engaged in the business of exporting aircraft and aircraft-related electronic parts for the aviation industry. At the time of the alleged RICO violations, Gidon Armon was the president and a shareholder of Imrex; Jacob Armon, his son, was an officer of Imrex.

In the late 1970's, Sedima learned that the North Atlantic Treaty Organization ("NATO") was about to commence programs to overhaul and upgrade HAWK missiles deployed in Belgium.

In 1979, Sedima and Imrex entered into a joint venture agreement for the purpose of supplying electronic component parts to Ateliers de Constructions Electriques Charleroi ("ACEC"), a Belgian corporation, which supplied the ultimate customer, NATO. They agreed to share equally in the profits and losses of the joint venture.

Under the terms of their agreement, Sedima was responsible for procuring orders from ACEC, and for supplying Imrex with the specifications for the component parts and the identities of the authorized manufacturers or vendors. In addition, Sedima was responsible for conducting negotiations on behalf of the joint venture with ACEC. For its part, Imrex coordinated the execution of orders in the United States and provided Sedima with certain documentation more fully described below.

In the ordinary course of business, when ACEC ordered electronic component parts from the joint venture, Sedima would so advise Imrex, and would provide Imrex with the particular specifications required by NATO, including manufacturer information. Imrex, in turn, was responsible for issuing purchase orders to the authorized manufacturer or vendor. Imrex was to send Sedima a copy of each purchase order as a confirmation that the purchase had in fact been made, and as a representation of the price and other terms of the purchase.

Rather than sending copies of the actual purchase orders, the Armons, functioning as officers of Imrex, personally prepared and mailed to Sedima fraudulent purchase orders. These bogus orders overstated the cost of specific parts and misrepresented the terms on which they were purchased by the joint venture. When Imrex assembled orders for shipment, it would send credit memoranda which were supposed to recite the sales price for the particular shipment and the actual price paid by the joint venture for those items. However, the Armons caused Imrex to send credit

memoranda which grossly overstated the cost of the electronic component parts being shipped. Imrex was paid on the basis of these fraudulent credit memoranda. The Armons also made international telephone calls misrepresenting the terms and conditions of Imrex's purchases.

As a result, Sedima was led to believe that the joint venture was paying more money than was actually the case. Accordingly, when the profits were divided, Imrex received its share, as well as that amount by which the Armons had inflated the cost of the materials. Sedima's injuries exceeded $175,000.00.

The proceeds of these illegal activities were not kept separately, but rather were deposited into Imrex's corporate accounts and used by the Armons in the general operation of Imrex's business. By these means, Imrex (and the Armons) both harmed Sedima and enhanced their ability to harm others by similar unfair and illegal means.

It has been observed that "[w]hite collar crime is a low visibility, high impact factor in our society. . . . [L]ike common crime, [it] can have a serious influence on the social fabric, and on the freedom of commercial and interpersonal transactions." H. Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime,* at 6-7 (1970). Although the fraudulent actions of Imrex and the Armons, by themselves, may have had but a limited effect on the totality of interstate and international commerce, the ramifications of permitting this type of behavior to go unpunished, undetered, and uncompensated are potentially global.[2]

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2. The most comprehensive study of fraud done in recent years was published in 1974 under the auspices of the Chamber of Commerce of the United States. The Chamber estimated the direct economic cost of fraud as follows:

(Cont'd)

REASONS FOR GRANTING THE WRIT

This case presents a significant opportunity to settle the law of the land concerning the scope and intent of 18 U.S.C. §1964(c) ("civil RICO"). This Court has never before ruled on these issues.

A divided panel of the Second Circuit Court of Appeals, for two distinct reasons, affirmed the District Court's dismissal of Sedima's RICO claims.[3] Without the benefit of prior briefing on the issue, the majority unjustifiably required Sedima to plead and prove prior criminal convictions of the predicate acts listed in 18 U.S.C. §1961(1) as a condition precedent to a civil RICO suit (App. 28a-44a). Moreover, the Court devised a standing requirement that Sedima's injuries be of the kind inflicted by "mobsters." (App. 23a-28a).

(Cont'd)

Billions of Dollars

1.	Bankruptcy Fraud	.08
2.	Bribery, Kickbacks and Payoffs	3.00
3.	Consumer Fraud	21.00
4.	Embezzlement	7.00
5.	Insurance Fraud	2.00
6.	Receiving Stolen Property	3.50
7.	Securities Theft and Fraud	4.00
8.	Credit Card and Check Fraud	1.10
9.	Computer Related Fraud	.10
	Total	41.78

Given the inflation rate since 1974, it would not be unreasonable to estimate a figure twice that today. *See* Testimony of FBI Director William H. Webster, *Hearings on the Department of State, Justice and Commerce, the Judiciary, and Related Agencies,* Subcommittee on Appropriations, House of Representatives, 96th Cong. 2d Sess. 17 (1980) ($44 to 100 billion). There can be no more significant issue to government than that its contract procurements process be free from fraud.

3. For purposes of analysis, the holdings of the Court of Appeals are considered in reverse order.

In so ruling, the Court of Appeals overstepped the bounds of Article III of the United States Constitution and usurped the lawmaking powers set aside for Congress in Article I.

I.

The Court of Appeals incorrectly held that a defendant must be criminally convicted for committing predicate acts before a private litigant can sue under civil RICO.

Employing casuistic reasoning, the Court of Appeals held that "a prior criminal conviction [of predicate acts] is a prerequisite to a civil RICO action." (App. 28a). This holding flies in the face of the unambiguous language of §1964(c) and other pertinent provisions of RICO, disregards relevant legislative history, and conflicts with most of the decisions which have ruled on this issue.

Language. In determining the scope of a statute, we look first to its language. *United States v. Turkette,* 452 U.S. 576, 580 (1981). The plain language of civil RICO does not support the Court of Appeals' prior conviction requirement. Section 1964(c) unambiguously provides that "[a]ny person injured in his business or property by reason of a *violation of section 1962* of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee." (Emphasis supplied.)

For purposes of determining whether §1964(c) requires a civil defendant to be previously convicted for committing predicate acts, inquiry must begin with a determination of the meaning of the phrase "violation of section 1962", as used in the statute. Such a violation occurs when an individual or entity engages in certain "unlawful" conduct. This conduct includes (i) investing

income, derived from a pattern of racketeering activity, in any enterprise engaged in interstate or foreign commerce, (ii) acquiring or maintaining control of such an enterprise through a pattern of racketeering activity; (iii) participating in the conduct of such an enterprise's affairs through a pattern of racketeering activity; and (iv) conspiring to do any of the above.[4] 18 U.S.C. §1962 (1970). Thus, engaging in "racketeering activity" is necessary for a violation of §1962. "Racketeering activity" is defined in 18 U.S.C. §1961(1)(A), (B) (1978) as meaning certain predicate acts "chargeable under State law" or "indictable" under, *inter alia,* 18 U.S.C. §1341 (1970) (mail fraud) or 18 U.S.C. §1343 (1956) (wire fraud).[5]

The analysis now turns to the question of what constitutes "chargeable" or "indictable" acts. These words, under accepted statutory construction, are to be defined according to their "ordinary meaning." *Russello v. United States,* 104 S. Ct. 296, 299 (1983).

Applying the same analysis as *Russello,* Webster's Ninth New Collegiate Dictionary (1983) defines the suffix "-able" as meaning "capable of, fit for, or worthy of." The American Heritage Dictionary of the English Language (1981) says "susceptible, capable, or worthy of." A civil RICO defendant who has committed predicate acts which are chargeable or indictable is,

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4. Section 1962, it should be understood, "is *not* a criminal statute; it says 'unlawful,' not criminal. . . . [T]he role of §1962 is to set a legal standard, not to define a crime." Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 55 Notre Dame L.R. 237, 243 (1982) ("*Civil Action*"). Therefore, one need not be criminally charged, indicted or convicted in order to be considered in violation of §1962.

5. 18 U.S.C. §1961(C), (D) (1978) are irrelevant to this petition.

therefore, merely susceptible to criminal prosecution. He need not have been already charged or indicted — much less convicted — for those acts.

Despite the ordinary meaning of the words, the majority based its decision, in large measure, on the assumption that the words "chargeable" and "indictable" mean previously convicted. The court ignored the plain meaning of the words and, instead, defined them in terms of what it supposed Congress might have intended. The court stated:

> As for the language "any act which is indictable" (or "chargeable"), conceivably Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies, informations are not required, since the acts need only be "indict*able*" or "charge*able*" (emphasis added). But a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts — proved by a preponderance of the evidence only — and say that these facts make out acts which are "indictable" or "chargeable."

(App. 35a-36a).

This analysis is clearly at variance with normal rules of construction. "[A]bsent clear evidence of contrary legislative intention, a statute should be interpreted according to its plain language." *United States v. Apfelbaum,* 445 U.S. 115, 121 (1980)

(construing Title II of the Organized Crime Control Act). "Plausible alternatives" to what "conceivably Congress meant" are not equivalent to "clear evidence of contrary legislative intent." *Id.*

The majority's analysis is belied by both the structure of the Organized Crime Control Act as a whole and Title IX in particular. Nowhere is there any suggestion that prior convictions are required as the foundation for bringing a civil RICO claim.

When Congress required a conviction as part of the legislative scheme of the Organized Crime Control Act, it knew how to do so. Title X, 18 U.S.C. §§3575-3578 (1970), speaks of "conviction[s]" at several points. *See, e.g.,* 18 U.S.C. §§3575(d), (e), (g), 3576 and 3577. *Cf. Ianelli v. United States,* 420 U.S. 770, 786-89 (1975) (The Organized Crime Control Act is a "carefully crafted piece of legislation") (construing Title VII in light of Titles IX and X).

An analysis of RICO itself demonstrates Congress's deliberate avoidance of a prior conviction requirement in §1964(c). 18 U.S.C. §1963(c) (1970) provides that "[u]pon *conviction* of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section." (Emphasis supplied). Neither the term "conviction" nor any variant thereof appears in sections 1961, 1962, or 1964(c). Indeed, 18 U.S.C. §1964(d) (1970) provides that a previously convicted RICO defendant shall be estopped "from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States." Congress' failure to use the term "conviction" in civil RICO manifests an intent not to require previous convictions of predicate acts or of RICO itself.

Legislative History. RICO's legislative history further supports the conclusion that prior convictions of predicate offenses are unnecessary to the prosecution of civil claims under the statute. Representative Mikva, at the time he offered an amendment to Title IX to curtail frivolous suits under civil RICO, specifically stated that "there need not be a conviction under any of these laws for it to be racketeering." 116 Cong. Rec. 35,342 (1970).[6]

The majority, by contrast, derived its view of Congress's intent from a somewhat skewed analysis of RICO's language. The Court of Appeals began by noting that "[t]he Act is designed to provide new penalties and remedies to combat conduct which explicitly has *already been found criminal.*" (App. 37a; emphasis supplied). In support of this proposition, the Court of Appeals relied upon Professor G. Robert Blakey's comment that "RICO did not itself 'draw a line between criminal and innocent conduct.' but rather 'authorized the imposition of different criminal or civil remedies for conduct *already criminal,* when performed in a specified

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6. The majority was obviously aware of this legislative history, but chose to disregard it. Downplaying the significance of other remarks made by Representative Mikva in connection with his proposed amendment, the majority stated: "Deriving legislative intent from a dissenting congressman's 'parade of horrors' speeches in opposition is a notoriously dubious practice." (App. 15a, n. 22).

The implication that Representative Mikva did not understand the scope and intent of civil RICO is unwarranted. Representative Mikva was a former law clerk in the Supreme Court. He served on the National Commission on Reform of the Federal Criminal Law, which examined a number of concepts subsequently embodied in RICO. *See Civil Action,* 58 Notre Dame L.R. at 253, n. 47. He was a member of the House Judiciary Committee which studied the bill. Representative Mikva, now a judge in the District of Columbia Circuit, obviously knew what he was saying when he commented that a prior conviction was unnecessary.

fashion.' ''[7] (App. 37a). The majority not only altered Professor Blakey's words, it took them out of context.[8] Clearly, Professor Blakey's comment does not support the proposition for which it was cited, nor is it illustrative of the legislative intent with respect to this issue.

In buttressing its contention that criminal convictions must precede civil claims, the majority went on to state that although "RICO liability simply does not exist without criminal conduct . . .," nonetheless "in a civil context, there is no way of knowing whether the conduct in question is 'already criminal[.]' " (App. 38a). The court conjectured that, "had Congress considered this problem, it would have required previously established convictions in the context of section 1964(c)."[9]

After analyzing certain problems (*e.g.* burden of proof) "of which there is no indication that Congress even dreamed [,]" (App. 38a), the majority concluded: "[i]t is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, *it would have intended* criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action." (App. 41a; emphasis supplied).

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7. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Civil and Criminal Remedies,* 53 Temp. L.Q. 1009, 1032 (1980) ("*Basic Concepts*"). Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970 when the Organized Crime Control Act was processed.

8. Professor Blakey, in fact, was arguing that "[o]nce the policies of strict construction or leniency had been implemented in the construction of the underlying 'racketeering activity,' and the line had been crossed into the sphere of criminality, it was inappropriate to further restrict the scope of the statute by reapplying these policies." *Basic Concepts,* 53 Temp. L.Q. at 1032. Not only does this argument not support the Court's reasoning, it militates against the Court's narrow interpretation of §1964(c).

9. The Court subsequently noted that Congress omitted "to examine this problem except very obliquely. . . ." (App. 40a, n. 57).

In this manner, the majority twisted statutory construction into a Gordian knot. First, it interpreted the language of civil RICO through a contrived analysis of congressional intent. It thus concluded that the language of the statute was ambiguous. Then, it derived legislative intent from an examination of that "ambiguous" language. Obviously, this method of analysis can support virtually any proposition, no matter how preposterous.

Other Decisions. Virtually every civil RICO decision which considered the issue has rejected the prior conviction argument as lacking any support in RICO's language or legislative history. (*See* App. 30a-31a, n. 42, 43). Most civil RICO decisions, significantly, have not even considered it to be an issue worth addressing.

The majority questioned the soundness of those decisions which relied upon *United States v. Cappetto,* 502 F. 2d 1351 (7th Cir. 1975), *cert. denied,* 420 U.S. 925 (1975). The majority reasoned that since *Cappetto* dealt solely with the government's ability to secure a civil injunction under 18 U.S.C. §1964(a) (1970), *Cappetto's* rejection of a prior conviction requirement "made no holding with respect to private civil actions." (App. 29a).

This conclusion ignores the deliberate and parallel use of the term "violation" in sections 1963(a), 1964(a) and 1964(c). Section 1962, and, therefore §1961(1), apply equally to all three sections.[10]

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10. The imposition of a prior criminal conviction requirement, therefore, places the decision below in conflict with the holdings in *United States v. Licavoli,* 725 F. 2d 1040, 1047 (6th Cir. 1984) (criminal RICO); *United States v. Malatesta,* 583 F. 2d 748, 757 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States,* 440 U.S. 962 (1979) (criminal RICO); and *United States v. Frumento,* 563 F. 2d 1083, 1087 (3rd Cir. 1977), *cert. denied sub nom. Sills v. United States,* 434 U.S. 1072 (1978) (criminal RICO).

To dismiss *Cappetto* as irrelevant is to disregard the structure of RICO as an integrated whole[11] and to ignore Congress' direction that RICO "be liberally construed to effectuate its remedial purpose." Pub. L. 91-452 §904(a) (1970).

It is clear that the Court of Appeals ventured well beyond the established bounds of judicial interpretation. The requirement of prior predicate act convictions is indefensible. This Court has a clear basis for exercising its power to reverse the decision below.

II.

The Court of Appeals incorrectly held that standing to sue under civil RICO requires an injury of the kind caused by mobsters.

Contrary to the plain language of §1964(c), extensive legislative history, and the overwhelming weight of judicial authority, the majority held that standing to sue civilly should be limited to instances where the plaintiff's injury is of the kind caused by "mobsters" who "through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises cause systemic harm to competition and the market, and thereby injure investors and competitors." (App. 27a).

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11. Congressman Poff, one of the sponsors of RICO, observed that in his "experience, no single measure [had] received more thorough consideration than this bill." 116 Cong. Rec. 35,204 (1970). As Mr. Justice Cardozo stated in *George Moore Ice Cream Co. v. Rose,* 289 U.S. 373, 378 (1933): "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function."

The Court of Appeals resurrected the largely discredited "organized crime" requirement by shifting the focus from the type of defendant to the type of injury. The Court of Appeals, however, never explained what a mobster-type injury is or how it is inflicted. Presumably, it is caused by some kind of a mobster-type action. There is, however, no principled way to distinguish between an injury of the kind inflicted by a "mobster" and an injury caused by a violation of §1962, unless the majority is requiring that the defendant himself be a "mobster". As Judge Cardamone, in his dissent below explained: "This formulation is no more than a euphemism for an 'organized crime' nexus requirement that should not be adopted by this Court after its rejection by the lawmakers." (App. 56a).

Language. Congress specifically delimited the type of injury compensable under civil RICO as injury to business or property. In ruling as it did, the Court of Appeals redrafted §1964(c) to say, in effect, that only a person suffering from a "mobster-type injury" to his business or property by reason of a violation of §1962 may sue. "[T]he short answer is that Congress did not write the statute that way." *Russello v. United States,* 104 S. Ct. at 300 [*quoting United States v. Naftalin,* 441 U.S. 768, 773 (1979)].

The majority based its conclusion upon the fact that "one of the Senate predecessors to RICO was framed as an amendment to the Clayton Act." (App. 25a). The majority properly recognized that it would "be inappropriate to carry over wholesale the elaborate antitrust case law. . . ." It went on however, to state that "there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language." (App. 26a). The majority cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977) for the proposition that "antitrust injury" is "injury of the type the antitrust laws were designed to prevent." (App. 25a).

The majority concluded that "the 'by reason of' language in Section 1964(c) is intended to limit standing to those injured by a 'racketeering injury,' by an injury of the type RICO was designed to prevent." (App. 25a). In other words, the plaintiff must show an injury distinct from or in addition to that caused by the predicate acts (App. 28a).

Brunswick did, of course, hold that there must be a relationship between the violation of Section 4 of the Clayton Act and the plaintiff's injury; it did not, however, hold that it had to be distinct. "By reason of" in Section 4 requires, not distinct, but actual injury. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562-63 (1981).

Standing under the antitrust laws plays a key role in keeping markets competitive. When an antitrust violation occurs and persons are injured, the standing requirements select from among them the appropriate person to bring the action consistent with the policy goals of the legislation. Overbroad liability which might arise from inappropriate plaintiffs bringing suit could result in the destruction of competitors. Accordingly, limits on liability keep the market competitive.

But RICO has another purpose. *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) put it well:

> It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have no applicability here.

Accordingly, the majority's analogy of the language of RICO to that of the antitrust laws is entirely inappropriate and lends no support to a mobster-type injury requirement.

Legislative History. Nothing in the legislative history indicates that Congress intended a mobster-injury standing requirement. At the House hearings on Title IX, the Association of the Bar of the City of New York objected to the scope of the bill as reaching beyond what has traditionally been considered "organized crime." 91st Cong. 2d Sess. 294 (1970). Senator McClellan, one of the bill's principal sponsors, responded that such a concern "confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination." 116 Cong. Rec. 18,913 (1970). Senator McClellan further observed that the predicate offenses "are characteristic of organized crime. [They] lend themselves to organized commercial exploitation . . . It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well." *Id.* at 18,940.

During the House debates on RICO, Congressman Biaggi proposed an amendment that sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. *Id.* at 35,343. The amendment was vigorously attacked on constitutional grounds. House Judiciary Chairman Celler objected that such terms were "imprecise, uncertain and unclear," *Id.* at 35,343, and that mere membership in an organization should not be punished. *Id.* at 35,343-44. Congressman Poff objected that such an amendment might violate this Court's rulings that struck down statutes which created status offenses, such as *Scales v. United States*, 367 U.S. 203 (1961) and *Robinson v. California*, 370 U.S. 660 (1962). 116 Cong. Rec. 35,344 (1970). Congress rejected the amendment. *Id.* at 35,346.

The legislative history demonstrates that Congress had fully considered and rejected attempts to circumscribe RICO by the amorphous concept of organized crime. Neither the language of

RICO nor Congress's underlying intent support the majority's imposition of a mobster-type injury requirement.

Other Decisions. Every other circuit court that has considered the issue has refused to read into §1964(c) any sort of organized crime limitation. *See Alcorn County v. U.S. Interstate Supplies, Inc.,* 731 F. 2d 1160, 1167 (5th Cir. 1984); *Sutliff, Inc. v. Donovan Companies Inc.,* 727 F. 2d 648, 654 (7th Cir. 1984); *Owl Construction Co., Inc. v. Ronald Adams Contractor, Inc.,* 727 F. 2d 540, 542 (5th Cir. 1984), *petition for cert. filed,* 53 U.S.L.W. 3098 (U.S. June 11, 1984) (No. 83-2042); *Bunker Ramo Corp. v. United Business Forms, Inc.,* 713 F. 2d 1272, 1287, n. 6 (7th Cir. 1983); *Schacht v. Brown,* 711 F. 2d 1343, 1356 (7th Cir. 1983), *cert. denied sub nom. Arthur Anderson and Co. v. Schacht,* 104 S. Ct. 508, 509 (1983); *Bennett v. Berg,* 685 F. 2d 1053, 1063 (8th Cir. 1982), *aff'd,* 710 F. 2d 1361 (8th Cir. 1983) (*en banc*), *cert. denied sub nom. Prudential Ins. Co. v. Bennett,* 104 S. Ct. 527 (1984). This Court, too, has refused to limit other federal statutes which, like RICO, were passed to deal with aspects of organized crime. *See, e.g., United States v. Culbert,* 435 U.S. 371, 374 (1978) [18 U.S.C. §1951 (1946); extortion]; *United States v. Fabrizio,* 385 U.S. 263, 265-67 (1966) [18 U.S.C. §1953 (1961); lottery tickets].

The Seventh Circuit aptly noted: "having already rejected the 'organized crime' limitation, . . . this court does not wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO." *Schacht v. Brown,* 711 F. 2d at 1356. Most recently, the Eighth Circuit flatly rejected the Second Circuit's mobster-type injury requirement as "contrary to our holding in *Bennett.*" *Alexander Grant & Co. v. Tiffany Industries, Inc.,* No. 83-1608 (8th Cir., Aug. 22, 1984).

The creation of a mobster-type injury standing requirement is indefensible on any ground. Accordingly, the instant petition should be granted, and the decision below reversed.

III.

A federal court should not be permitted to redraft a federal statute to preclude a claim under it where the statute is clear on its face, its legislative history is not contrary, and the claim falls within its literal terms.

Uncomfortable with the scope of §1964(c), a statute broadly written and conceived, the Court of Appeals redrafted it, creating a remedy so lacking in force as to nullify Congress' explicit intention "to create new remedies to deal with the unlawful activities of organized crime." Pub. L. 91-952 §1 (1970).

Justice Black, speaking for the Court in *United States v. Braverman,* 373 U.S. 405, 408 (1963), warned federal courts not to "interpret a statute so narrowly as to defeat its obvious intent." Chief Justice Burger, has described the proper role of courts in construing statutes:

> We have emphasized in the recent past that '[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute.' . . . Our task rather is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted.

Diamond v. Chakrabarty, 447 U.S. 303, 318 (1980) [*quoting TVA v. Hill,* 437 U.S. 153, 194 (1978)].

The Court of Appeals overstepped the limits of its authority under Article III of the United States Constitution and encroached upon Congress' Article I domain. *See United States v. Turkette,* 452 U.S. at 587 ("In the face of . . . objections [dealing with federal and state relations] Congress nevertheless proceeded to enact [Title IX] . . . . There is no argument that Congress acted beyond its powers in so doing. That being the case, the Courts are without authority to restrict the application of the statute.")

A federal court has "no authority to substitute [i]ts views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 626 (1978), *reh'g denied,* 439 U.S. 884 (1978). "Once Congress addresses a subject . . . the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines Inc. v. Transport Workers Union,* 451 U.S. 77, 96, n. 34 (1981). The Court of Appeals followed none of these precepts. Rather, it devised its own three step process of judicial legislation.

First, the Court of Appeals determined that the language of §1964(c) is ambiguous (App. 10a). This conclusion was based on the observation that although RICO was designed

> to deal with organized crime as an economic phenomenon [,] it has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead led to claims against such respected and legitimate enterprises as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Sterns & Co., and Merrill Lynch, to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

(App. 9a-10a).

Judge Posner eloquently answered this objection: "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble damage proceedings — the price of eliminating all possible loopholes." *Sutliff Inc. v. Donovan Companies, Inc.,* 727 F. 2d at 654.

Second, the Court of Appeals determined that "[t]he most important and evident conclusion to be drawn from the legislative history is that Congress was not aware of the possible implications of §1964(c)." (App. 19a).

This determination is belied by the comments of Senator Hruska, who introduced S. 1623, the predecessor to S. 1861, which ultimately became RICO. Senator Hruska specifically stated with respect to the private treble damage provision of S. 1623:

> [T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill . . . . I believe that the time has arrived for innovation in the organized crime fight. The bill is innovative in the sense that it vitalizes procedures which have been tried and proved in the antitrust field and applies them into the organized crime field where they have been seldom used before. Hopefully, experts on organized crime will be able to conceive of additional applications of the law. *The potential is great.*

115 Cong. Rec. 6,993 (1969) (emphasis supplied).

The lack of a private treble damages remedy in S. 1861 does not negate the significance of these remarks, as the Court of

Appeals contended (App. 11a-13a, n. 18, 19). As Professor Blakey explained, this provision was "not dealt with explicitly in [S. 1861] in an effort to streamline it and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies."[12] *Basic Concepts,* 53 Temple L. Q. at 1017-18.

Congress ultimately included the private treble damage remedy set forth in §1964(c). It cannot be said that Senator Hruska's comments are not an integral part of that section's legislative history. This conclusion is consistent with this Court's observation that "[t]he legislative history clearly demonstrates that the RICO statute was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S. Ct. at 302.

Third, into this artificial void of meaning and history, the Court imposed prior conviction and standing requirements of its own devising.

This approach is mistaken. "In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark." *Harrison v. PPG Indus.,* 446 U.S. 578, 592 (1980). It was because "Congress cannot be expected to specifically address each issue of statutory construction that may arise," *Albernaz v. United States,* 450 U.S. 333, 341 (1981), that Congress directed the courts to liberally construe RICO. Perhaps more than anything else, this direction is the most significant indication of Congress' intent.

12. Professor Blakey's review of the legislative history in *Civil Action* was cited with approval in *Russello v. United States,* 104 S. Ct. at 303.

The exceedingly broad language of civil RICO, the provision for recovery of treble damages, and the potential stigma of the label "racketeer" provide a powerful temptation for courts to reduce its scope. As in the instant case, valid civil RICO claims are being dismissed, despite the fact that they fall within the letter of the statute. *See, e.g., Johnsen v. Rogers,* 551 F. Supp. 281, 284 (C.D. Cal. 1982) ("Federal Courts increasingly are refusing to find a RICO claim in civil cases even though such a claim could fall within a literal reading of the statute.")

Indeed, in the instant case, the Court of Appeals created a prior conviction requirement despite the facts that the District Court did not rule on the issue and that the parties had not briefed it. Thus, the court considered neither the arguments made herein, nor the possible ramifications of such a requirement.

For example, the practical effect of a prior conviction requirement is to create an atmosphere where private litigants on both sides are virtually forced to involve themselves in the criminal processes in order to bolster their respective civil cases. Plaintiffs, on their part, will be tempted to press local United States Attorneys to commence prosecutions of suspected predicate act violations in order to obtain the prior convictions necessary to bring suit. Defendants, perhaps sensing the imminence of a treble damage suit based upon fraud or similar larcenies,[13] will be more likely to ingratiate themselves with state prosecutors in order to ward off federal prosecution for predicate acts of mail or wire fraud.

These, and other as yet unimagined abuses, are bound to occur when a federal court undertakes the role of lawmaker. This Court should act to put an end to this type of judicial activism.

13. Common law larceny is not a predicate offense listed in §1961(1).

CONCLUSION

For the reasons above stated, this petition for a writ of certiorari should be granted, and, upon granting certiorari, the Court should reverse the determination of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 796—August Term, 1983

(Argued February 1, 1984 Decided July 25, 1984)

Docket No. 83-7965

SEDIMA, S.P.R.L.,

Appellant,

—v.—

IMREX COMPANY, INC.,
GIDON ARMON and JACOB ARMON,

Appellees.

Before:

LUMBARD, OAKES, and CARDAMONE,
Circuit Judges.

Appeal from judgment by the United States District Court for the Eastern District of New York (Glasser, J.), dismissing claims under the Racketeer Influenced and

Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982) (RICO), for failure to allege a "RICO-type injury" in a complaint alleging business fraud.

Affirmed for the reasons stated by the district court and for the additional reason that appellant's RICO claims were based on predicate acts listed in 18 U.S.C. § 1961(1) in the absence of criminal convictions of such acts.

FRANKLYN H. SNITOW, New York, N.Y. (William H. Pauley, III, Keith S. Orenstein, Orenstein, Snitow & Pauley, New York, NY, of counsel), *for Appellant*.

RICHARD EISENBERG, Garden City, N.Y. (Shaw, Goldman, Licitra, Levine & Weinberg, Garden City, NY, of counsel), *for Appellees*.

OAKES, *Circuit Judge:*

This is another in the new wave of cases involving "private civil RICO"—the private right of action found in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1982). Appeal is from a judgment, designated as final pursuant to Fed. R. Civ. P. 54(b), of the United States District Court for the Eastern District of New York, I. Leo Glasser, Judge, dismissing the RICO claims in appellant's amended complaint. We affirm.

Facts

This case involves business fraud. Plaintiff-appellant Sedima S.P.R.L. (Sedima) is a Belgian corporation in the business of importing and exporting to and from Belgium electronic, mechanical and hydraulic parts manufactured in the United States and abroad. Appellee Imrex is an American corporation engaged in exporting aircraft and aircraft-related electronic component parts. Appellees Jacob Armon and Gidon Armon are officers of Imrex.

In 1979, Sedima and Imrex entered into a joint venture to provide electronic component parts for a NATO subcontractor in Belgium. Imrex obtained the parts and shipped them to Europe pursuant to orders secured by Sedima. Sedima allegedly secured approximately $8.5 million worth of orders to be placed through Imrex.

Sedima alleges that Imrex and the Armons fraudulently prepared purchase orders, invoices and credit memoranda for Sedima that they knew falsely overstated purchase prices, attendant costs and shipping and financing charges of the parts purchased on behalf of the joint venture. The complaint further alleges that Imrex received monies belonging to the joint venture pursuant to these fraudulent purchase orders, invoices and credit memoranda. In addition to counts alleging breach of contract, breach of fiduciary duty, unjust enrichment, breach of the joint venture agreement, conversion, breach of a constructive trust and a cause of action based on quasi contract, three of the counts allege violations of RICO, 18 U.S.C. § 1962(c).[1]

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[1] 18 U.S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly

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Two of the RICO counts allege that the fraudulent purchase orders, invoices and credit memoranda constitute a pattern of racketeering activity, the predicate acts being separate and numerous violations of the Mail Fraud Act, 18 U.S.C. § 1341 (1982) and the Wire Fraud Act, 18 U.S.C. § 1343 (1982). The third count charges a RICO conspiracy under 18 U.S.C. § 1962(c) and (d).[2] Sedima seeks treble damages and reasonable attorneys' fees under these RICO counts. 18 U.S.C. § 1964(c).[3]

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or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

2 18 U.S.C. § 1962(d) provides:

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

3 18 U.S.C. § 1964 provides:

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States

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The District Court Decision

Judge Glasser dismissed the RICO counts on the basis that there was a failure to allege a RICO-type injury. In so holding, he relied on a series of decisions, discussed *infra*, which have stated that in order for an injury to be "by reason of a violation of section 1962," as required by section 1964(c), something more than or different from injury that would result from the predicate acts alone must be shown by the plaintiff. *Bankers Trust Co. v. Feldesman*, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 206-09 (E.D. Mich. 1981); *North Barrington Development, Inc. v. Fanslow*, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980).

The district court adopted the reasoning of two related lines of cases. One series of cases, relying on an analogy between RICO and the antitrust laws, requires that a RICO plaintiff allege a "competitive injury," that is, an injury to business or property stemming from competitive harm. *North Barrington*, 547 F. Supp. at 210-11, *Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1007 (C.D. Cal. 1982); *Feldesman*, 566 F. Supp. at 1241. The other series of cases requires plaintiffs to allege a "racketeering enterprise injury," an injury that occurs where "a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise." *Landmark Savings*, 527 F. Supp. at 209, relying upon Note, *Reading the Enterprise Element Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. U.L. Rev. 100, 125-33

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under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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(1981). Judge Glasser found no allegation of any injury in this case apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud, and accordingly dismissed the RICO counts.

Background

The problem addressed by the district court, which has received much attention both in the courts and among commentators, is that a broad reading of the civil RICO provisions would allow plaintiffs to bring suit in federal court[4] under RICO nearly anytime they could allege injury caused by two acts which are violations of any one of the predicate acts listed in RICO. Since these predicate acts include a great many state law violations, federal securities law violations, and federal mail and wire fraud violations, an expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction, and to bypass remedial schemes created by Congress, particularly in the securities area. The fact that successful RICO plaintiffs may obtain treble damages and attorneys' fees provides, of course, additional incentives to plaintiffs to categorize their actions as RICO claims.

Section 1964(c) states that anyone "injured" "by reason of" a violation of section 1962 is entitled to treble damages. Section 1962 "violations" include conducting "enterprises" "through a pattern of racketeering"; a "pattern of racketeering" is defined by section 1962(5) as

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4 Recently at least one state court has exercised jurisdiction over a federal civil RICO claim. *See Greenview Trading Co. v. Hershman & Leicher P.C.*, N.Y.L.J. Mar. 13, 1984, at 5, col. 3 (N.Y. Sup. Ct.); Flaherty, *Two States Lay Claim to RICO*, Nat'l L. J., May 7, 1984, at 3, col. 1.

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two or more "acts of racketeering" occurring within a given time. "Acts of racketeering" are defined by section 1961(1), inter alia, as any of a number of acts "chargeable under State law," acts "indictable" under a variety of federal laws, or an "offense" under the federal securities law. Thus, ignoring for the moment some troubling ambiguities, the statute on its surface seems to allow private suits for people injured by defendants who have committed two so-called predicate acts.

Given this language it is not surprising that there has been an explosion of civil RICO litigation. Only a few cases including civil RICO claims were published in the decade following passage of the Act in 1970;[5] a law review note asserts that courts published only two opinions dealing with civil RICO by 1978 and only thirteen by early 1981. Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 n.7 (1982). There are now over 100 published decisions. Siegel, *"RICO" Running Amok in Board Rooms*, L.A. Times, Feb. 15, 1984, at 1. This development has resulted, no doubt, from the bar's increased awareness of the statute, spawned, perhaps, by an influential law review article coauthored by Professor G. Robert Blakey and Brian Gettings which proposed a broad reading of the statute. Professor Blakey's position as chief counsel to the Senate subcommittee which proposed RICO has evidently given his expansive views of the statute special

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5 This is true though there were some law review commentaries dealing with the subject, particularly in reference to the Seventh Circuit's *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974). *See* Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970—United States v. Cappetto*, 25 DePaul L. Rev. 508 (1976); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192 (1975).

credence.[6] A veritable wave of commentaries and cases making civil claims along lines suggested by Blakey and Gettings and others has occurred. We are told that there is now indeed a "RICO bar" which specializes in bringing or defending RICO claims. And members of that "bar" have found, as would appear obvious, that the stigma associated with the label "racketeering" is a good settlement weapon.[7] Indeed, a current adage is said to be that "RICO provides the only *civil* action where the defendant pleads not guilty." Bridges, *supra* note 6 at 44.

The problem with civil RICO is not the explosion of federal litigation. Congress is of course free to create federal causes of action for civil litigants within constitutional limits not necessarily in question here. ***But see infra*** notes 24, 49. But there is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow.

The Racketeer Influenced and Corrupt Organizations Act, as its very name implies, was designed to combat organized crime. The damage done by organized crime was the subject of much public concern and congressional

6 Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980).

Professor Blakey was the chief counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970 when, as he puts it, "the Organized Crime Control Act of 1970 . . . was processed." *See id.* at 1009 n.*. His writings are listed in Bridges, *Private RICO Litigation Based on "Fraud in the Sale of Securities"*, 18 Ga. L. Rev. 43, 46 n.20 (1983); *but see id.* 76-77 n.165; *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581 n.16, 582 n.17 (N.D. Ill. 1983). *See also infra* note 20.

7 *See* Bridges, *supra* note 6, at 47 & nn.27-28 and sources cited therein; Granelli, *Playing for Keeps with State RICO*, Nat'l L.J., July 5, 1982, at 1, col. 4; at 8, col. 1; *RICO the Enforcer*, Newsweek, Aug. 20, 1979, at 82.

activity throughout the 1950s and 1960s.[8] RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. Law 91-452 (1970), an act designed "to seek the eradication of organized crime in the United States . . . by providing new remedies to deal with unlawful activities of those engaged in organized crime." 116 Cong. Rec. 35191 (1970).

Title IX itself was designed "to protect legitimate businesses against the syndicate's infiltration."[9] It was an attempt to deal with organized crime as an economic phenomenon. In so doing, its enforcement provisions were modeled after the enforcement provisions of the antitrust laws. *See, e.g., infra* text accompanying note 26.

Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. Section 1964(c) has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch,[10] to name a few

8 *See* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 837-39 & nn.4, 9-15 (1980).

9 *Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, [hereinafter "House Hearings"] 91st Cong., 2d Sess. 157 (1970) (Statement of Attorney General Mitchell). *See also* 116 Cong. Rec. 35200 (1970) ("Title IX . . . is aimed at keeping organized crime out of legitimate businesses through the use of both criminal and civil penalties.") (Statement of Congressman St. Germain); Bradley, *supra* note 8, at 840-42 (review of legislative history).

10 *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231 (S.D.N.Y. 1983); *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636 (C.D. Cal. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F.

defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

Though there are a few reported cases where RICO has been used against reputed mobsters[11] or at least against organized criminals,[12] it is being far more frequently used for purposes totally unrelated to its expressed purpose. It has become a standard practice, for example, to insert a RICO claim in litigation involving tender offers.[13] It has become commonly used, as here, in typical business fraud cases,[14] in so-called "garden variety" securities fraud cases,[15] and in bank fraud cases.[16]

RICO, then, presents a classic case of a statute whose ambiguous language needs to be construed in light of Congress's purpose in enacting it.[17] The need to discern

Supp. 352 (E.D. Mich. 1983); *Taylor v. Bear Stearns & Co.*, 572 F Supp. 667 (N.D. Ga. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667 (W.D. Mich. 1983).

11 *E.g., Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981).

12 *Beth Israel Medical Center v. Smith*, 576 F. Supp. 1061 (S.D.N.Y. 1983).

13 *E.g., In re Action Indus. Tender Offer*, 572 F. Supp. 846 (E.D. Va. 1983).

14 *E.g., Adair v. Hunt Int'l Resources Co.*, 526 F. Supp. 736 (N.D. Ill. 1981).

15 *E.g., Trane Co. v. O'Connor Secs.*, 561 F. Supp. 301 (S.D.N.Y.), *vacated as moot*, 718 F.2d 26 (1983).

16 *E.g., Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019 (N.D. Ga. 1981), *overruled, Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

17 *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892). *See also United Steelworkers of America v. Weber*, 443 U.S. 193, 201-02 (1979); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947). *See also United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an

legislative intent is particularly important when, as here, crucial statutory language is drawn *in haec verba* from another statute where it has a peculiar technical meaning. The law itself calls for reference to legislative intent since the liberal construction clause states that the text should be construed to "effectuate its remedial purpose." We are, then, obliged to study the legislative history of RICO and particularly of section 1964(c) to inform our reading of that statute and, in particular, of the scope of the private civil remedy created by the Congress.

Legislative History

The legislative history of the Organized Crime Control Act of 1970 gives little hint of the intended scope of private action under civil RICO. While the Act for the most part originated in the Senate, the civil provision permitting suit by private persons, 18 U.S.C. § 1964(c), originated in the House.[18] Consequently it is not men-

unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words" (citing *Ozawa v. United States*, 260 U.S. 178, 194 (1922))).

18 RICO had a long legislative lineage. The Organized Crime Control Act of 1970 was derived from S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 769 (1969). Title IX of the Act, RICO, was added to S. 30 by the Senate. The substance of Title IX was contained in an earlier Senate bill, S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-71 (1969). Neither S. 1861 nor S. 30 contained a private civil cause of action. An earlier predecessor of RICO, S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-96 (1969), did contain a private civil cause of action based closely on the Clayton Act, providing explicitly for injunctive relief as well as for treble damages. S.1623 §§ 3(c), 4(a). That bill was itself patterned on two earlier Senate bills, S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967), both of which contained civil private actions similar to that in S. 1623. The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S. 1623 with S. 1861 apparently in part because S. 1861 provided broader governmental civil relief, such as the investigative demand, and was in other ways a more comprehensive bill. *See Hearings on Measures*

tioned in the Senate Report, although the other three subsections of section 1964 that were included in the Senate bill are discussed. This fact, we believe, is critical to consideration of the legislation. This is true because the "[c]ivil approach" discussed in the report of the Senate Judiciary Committee accompanying S. 30, Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969), refers solely to the Government's right to seek and obtain injunctions to prevent and restrain violations of section 1962 through divestment by individuals of their interest in enterprises, imposing restraints on future activities or investments, or ordering dissolution or reorganization of any enterprise. *Id.* at 24. Consequently any comments in the Senate Report analogizing to the antitrust laws, referring to the American Bar Association position in the Senate hearings, or otherwise pertaining to the Senate's "[c]ivil

Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 91st Cong., 1st Sess. 387 (1969) [hereinafter, "Hearings on S. 30"]; Bradley, *supra* note 8, at 841-42 & nn.27-28. There is no discussion in the legislative history indicating why S. 1861 did not provide a private cause of action. Professor Blakey, then Chief Counsel to the Senate Subcommittee, subsequently has written that the private civil section was dropped "in an effort to streamline [the bill] and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies." Blakey & Gettings, *supra* note 6, at 1017-18.

There were also a number of House predecessors to RICO which paralleled S. 30. *See* H.R. 19215, 91st Cong., 2d Sess., 116 Cong. Rec. 31914, H.R. 19586, 91st Cong., 2d Sess., 116 Cong. Rec. 35242 (1970). The private cause of action section eventually inserted by the House was taken from H.R. 19586. H.R. 19215 included a much more complete private cause of action section, explicitly allowing for private party injunctive relief. *See* Blakey & Gettings, *supra* note 6, at 1020.

While one may or may not agree with Blakey & Gettings that it is "unfortunate" that H.R. 19215 was not used, *id.*, it is significant that it was not. The more general H.R. 19586 was obviously less controversial, less likely to promote debate and hence more likely to result in passage of the bill.

All of the amendments made by the House to S. 30 limited its scope, with the exception of the inclusion of a private remedy.

approach" do not pertain to the scope, impact, or purpose of the private treble damage remedy inserted later by the House of Representatives.[19]

Ultimately the Senate accepted the House amendment adding subsection (c). Apparently, as the session was about to end, the Senate did not ask for a conference.

The legislative history on the House side is not much more instructive. The decision to add a civil private damages provision was made by a House subcommittee at the behest of Representative Sam Steiger and the American Bar Association.[20] The addition was not considered

19 Failure to recognize this crucial point has led a number of courts and commentators astray. For example, the original Eighth Circuit panel in *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd en banc*, 710 F.2d 1361, *cert. denied sub nom. Prudential Ins. Co. of America v. Bennett*, 104 S. Ct. 527 (1983), states that "section 1964(c) provides a private cause of action modelled on the antitrust laws" and then for its first citation to this effect refers to S. Rep. No. 617, 80-82, 125, 160 (1969). Yet every statement made in that Senate Report relates exclusively to civil remedies *not* including a private civil right of action, but only concerning the government's right to seek an injunction or forfeiture under the provisions of section 1963(a). This is not to say, of course, that the House insertion of the private treble damage action was not based on an analog to the antitrust laws, for it is obviously somewhat patterned in part after section 4(a) of the Clayton Act. 15 U.S.C. § 15(a) (1982). Indeed, the testimony of Edward L. Wright, then ABA president, in the House hearings on S. 30, the absolutely critical testimony leading to the inclusion of section 1964(c) in the House version of the bill, says only:

> In the portion seeking to add a proposed Section 1964, "Civil Remedies," we would recommend an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of Section 4 of the Clayton Act. Section 4 provides as follows: [quoting 15 U.S.C. § 4].

House Hearings, *supra* note 9, at 543-44.

20 House Hearings, *supra* note 9, at 520 (Proposal of Rep. Steiger), 548 (Proposal of the American Bar Association). Both proposals were patterned on the private remedy found in the Clayton Act. Significantly Steiger's proposal, like those in the rejected Senate bills, provided explicitly for a private injunctive remedy. *Id.* at 521. The legislative history is silent as to why the subcommittee rejected this language and explicitly created only the private action for treble

an important one, a remarkable fact which in itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it. Indeed, when the Judiciary Committee initially introduced the amended

damages which was eventually enacted as § 1964(c). The adopted statutory language was drawn from H.R. 19586, 91st Cong., 2d Sess. 56 (1970), one of the two House bills which paralleled S. 30. In choosing H.R. 19586 over H.R. 19215, 91st Cong., 2d Sess. (1970), the House explicitly rejected a private injunctive relief section. *See supra* note 18.

Later, on the House floor, an amendment also offered by Representative Steiger to provide private injunctive relief was withdrawn before the House could vote on it. 116 Cong. Rec. 35346 (1969). In the next term of the Senate the same amendment was proposed as a bill, S. 16, 92nd Cong., 1st Sess. (1971), as a way to "expand the available civil remedies" since "[n]ow only the United States can institute injunctive proceedings." *See Victims of Crime, Hearing before the Subcom. on Criminal Laws and Procedures of the Senate Com. of the Judiciary*, 92nd Cong., 1st Sess. 158 (1972) (Statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) [hereinafter "Victims of Crime"]. While post-enactment legislative history is not by any means conclusive, it cannot merely be ignored. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530-35 (1982). It thus seems altogether likely that § 1964(c) as it now stands was not intended to provide private parties injunctive relief. *But see Aetna Cas. and Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 909-10 (E.D.N.Y. 1983) (injunctive relief granted), *aff'd on other grounds*, No. 83-7728, slip op. at 2510 (2d Cir. Mar. 26, 1984). Two other courts of appeals have reserved judgment on this issue. *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983); *Bennett v. Berg*, 685 F.2d at 1064.

Professor Blakey also disagrees with this conclusion, making a rather remarkable argument based upon the use of the word "and" in § 1964(c), as follows. He states:

> A Congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969); *Bell v. Hood*, 327 U.S. 678, 684 (1946). Significantly, the treble damage clause of § 1964(c) is preceded by "and" and not "to." *See National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (grant of right in one form implies denial of right in another). Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level.

Blakey & Gettings, *supra* note 6, at 1038 n.133.

We do not find it significant that the word "and" is used in § 1964(c), especially since its treble damage antitrust analog, § 4 of the

bill, it did not even announce to the House that it had made the addition.[21] It was only in the middle of the second and last day of House discussion of the bill that a member of the committee noted that

> at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts—another example of the antitrust remedy being adapted for use against organized criminality.[22]

Clayton Act, 15 U.S.C. § 15(a) (1982), uses the same word, "and," while a different specific statutory provision of that act expressly gives a private antitrust plaintiff the right to seek an injunction (except when a common carrier is a defendant). Clayton Act § 16, 15 U.S.C. § 26 (1982). We endorse Judge Shadur's comment that an argument based on the word "and" is "bizarre and wholly unconvincing as a matter of plain English." *Kaushal v. State Bank of India*, 556 F. Supp. 576, 582 & n.17 (N.D. Ill. 1983). Indeed, the Supreme Court has explicitly held that the parallel language of § 4 of the Clayton Act *precluded* private injunctive relief. *Paine Lumber Co. v. Neal*, 244 U.S. 459 (1917); *Minnesota v. Northern Secs. Co.*, 194 U.S. 48 (1904).

21 One Judiciary Committee member indicated on the floor that three changes had been made from the Senate bill "merit[ing] discussion," but did not include the addition of the private cause of action among these three. 116 Cong. Rec. 35197-98 (1970) (remarks of Congressman McCulloch).

22 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Beyond this cursory statement, there are only two indications that the House was even made aware of the fact that the bill included a private cause of action. First there was Representative Steiger's amendment, quickly withdrawn, to add an injunctive remedy to the private action. *See* discussion *supra* note 20. More significantly, Representative (now Judge) Mikva offered an amendment providing for treble damages for defendants who became subjects of frivolous suits under the section. *See* 116 Cong. Rec. 35342-43 (1970). The evident purpose of this amendment, which was quickly defeated, *id.*, was to point out the dangerous overbreadth of the section, which Mikva claimed was a "dangerous tool . . . given to a competitor who wants to go after somebody who is competing too vigorously against him." *Id.* at 35342. We decline to infer from Representative Mikva's comments the conclu-

This brief remark is one of only three statements regarding section 1964(c) made on the House floor. *See supra* note 22.

The House subcommittee hearings[23] are not much more helpful. Although they contain useful analysis of the purposes for creating civil remedies for the government,[24] and generally for applying antitrust type civil remedies in the fight against organized crime,[25] most of this discussion took place before the private remedy was added to the bill. Thus, although there was testimony that section 1964 was too broad,[26] none of that testimony was addressed to the private cause of action provision. The only discussion accompanying the introduction of the private

sion that Congress intended to promulgate a statute as broad as the one he feared it was passing. Deriving legislative intent from a dissenting congressman's "parade of horrors" speeches in opposition is a notoriously dubious practice.

23 House Hearings, *supra* note 9.

24 *Id.* at 106 (Statement of Sen. McClellan). It was thought wise to provide the government with civil remedies as a way around the "one-sided" procedural protections afforded criminal defendants in American courts. *Id.* As to the constitutional permissibility of avoiding the procedural protections built into the criminal law by labelling a proceeding "civil," *see* Note, *Criminal Law—Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 Texas L. Rev. 1055 (1975); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192 (1975); *see also* Comment, *Constitutional Issues Raised by the Civil-Criminal Dichotomy of the Maine OUI Law*, 35 Me. L. Rev. 385 (1983). Civil remedies were also found to be a useful way to expand the nature of relief available to the federal prosecutors. House Hearings, *supra* note 9, at 107.

25 *See* House Hearings, *supra* note 9, at 147-49 (report of the ABA).

26 In particular, representatives of the Association of the Bar of the City of New York and of the American Civil Liberties Union objected to the scope of Title IX. *See* House Hearings, *supra* note 9, at 327-31 (Ass'n of the Bar report), 499-518 (statement and testimony of ACLU).

action came in a statement by Representative Steiger, who wrote that such an amendment would enable "those who have been wronged by organized crime [to] at least be given access to a legal remedy" and that it would also "enhance the effectiveness of Title IX's prohibitions."[27]

Nor do the House's broad pronouncements on the purposes of Title IX or on the meaning of its other sections reveal Congress' intent in promulgating the private action. The House Report in its introductory section refers, inter alia, to the purpose of "proscribing the operation of any enterprise engaged in interstate commerce through a 'pattern' o[f] 'racketeering activity.' " H. Rep. No. 91-1549, 91st Cong., 2d Sess. 35, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4010 (1970). It states that " '[r]acketeering activity' is defined in terms of specific State and Federal criminal statutes." *Id.* It adds that "[t]he title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." *Id.*

The section by section explanation is hardly more helpful. Referring to section 1961(1)[28] which defines

27 *Id.* at 520.

28 18 U.S.C. § 1961 provides in part:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangeous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investiga-

"racketeering activity," the report says that that term is defined

> to include murder, kidnaping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, mail, bankruptcy, wire and securities fraud, and obstruction of justice. State offenses are included by generic designation. Federal offenses are included by specific reference. The term "racketeering activity" is a key statutory term. Under section 1962 below, racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, or no collection of an "unlawful debt" there can be no violation of the provisions of this title.

Id. at 56, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4032. The House Report defines "pattern of racketeering activity" only by referring to the section 1961(5)[29]

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tions), section 1511 (relating to the obstruction of State or 'ocal law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds, or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States . . . .

29 18 U.S.C. § 1961(5) provides:

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date

definition that it is the equivalent of at least two acts of racketeering activity occurring within a given time period. *Id.* The report deals with section 1962 by saying that it "establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations," noting that subsection (c) "prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt." *Id.* at 57, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4033. In reference to the civil remedies provided in section 1964(c) for the violation of section 1962, the report merely paraphrases the language of section 1964(c).

The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications.

The clanging silence of the legislative history, coupled with the section's use in areas far afield from the battle against organized crime, has led some, though concededly not all, courts to read various limitations into the act in

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of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . . .

order to conform its use to that thought to best effectuate the congressional purpose.

Four such limitations have been widely considered: (1) whether RICO requires some nexus between the challenged activity and organized crime; (2) whether the injury complained of must result from "enterprise" involvement in the racketeering, rather than directly from the activity itself; (3) whether plaintiffs must allege a "competitive" or "racketeering injury"; and (4) whether there must be criminal convictions for the predicate acts underlying a civil RICO suit.

Even a cursory review of the case law indicates that there is simply no consensus on what RICO requires. While some courts have held that only those activities with some connection to organized crime may be the subject of civil RICO suits,[30] others, including this circuit,[31] have rejected this limitation.[32] Similarly, although some courts have read RICO to require a showing of

30 *E.g., Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D. Cal. 1983); *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 260 (E.D. La. 1981). *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 747 (N.D. Ill. 1981), *Noonan v. Granville-Smith*, 537 F. Supp. 23, 29 (S.D.N.Y. 1981); *Barr v. WUI/TAS, Inc.*, 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975).

31 *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom. Moss v. Newman*, 104 S. Ct. 1280 (1984).

32 *E.g., Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Schact v. Brown*, 711 F.2d 1343, 1356 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983); *Noland v. Gurley*, 566 F. Supp. 210, 217 (D. Colo. 1983); *Windsor Assoc., Inc. v. Greenfeld*, 564 F. Supp. 273, 277 (D. Md. 1983); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1351 (E.D. Pa. 1983); *Guerrero v. Katzen*, 571 F. Supp. 714, 719 (D.D.C. 1983); *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 570 F. Supp. 667, 669-70 (W.D. Mich. 1983); *Crocker Nat'l Bank v. Rockwell Int'l Corp.*, 555 F. Supp. 47, 49 (N.D. Cal. 1982); *Lode v. Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982); *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244, 247 (S.D.N.Y. 1981).

"competitive"[33] or "racketeering"[34] injury, more have held against imposing such limitations.[35] Finally, courts

33 *E.g., Bankers Trust v. Feldesman*, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983); *North Barrington Dev., Inc. v. Fanslow*, 547 F. Supp. 207, 211 (N.D. Ill. 1980) ("plaintiff must allege how it was injured competitively by the RICO violation in order to state a cause of action under § 1964(c)").

34 *Waste Recovery Corp. v. Mahler*, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 358 (E.D. Mich. 1983); *King v. Lasher*, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983); *In re Action Indus. Tender Offer*, 572 F. Supp. 846, 852 (E.D. Va. 1983); *Guerrero v. Kafzen*, 571 F. Supp. at 721 (injury "by reason of a RICO violation"); *Van Schaick*, 535 F. Supp. at 1137 & n.11 (commercial or business injury required); *Harper v. New Japan Secs. Int'l, Inc.*, 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982); *Johnsen v. Rogers*, 551 F. Supp. 281, 285 (C.D. Cal. 1982); *Gitterman v. Vitoulis*, 564 F. Supp. 46, 49 (S.D.N.Y. 1982); *Landmark Savs. & Loan v. Loeb Rhoades, Hornblower & Co.*, 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

35 The following are among the cases that have rejected a "competitive injury" requirement: *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d at 1288; *Schacht v. Brown*, 711 F.2d at 1358; *Bennett v. Berg*, 685 F.2d 1053, 1059 (1982), *aff'd en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied sub nom. Prudential Ins. Co. of America v. Bennett*, 104 S. Ct. 527 (1983); *Kimmel v. Peterson*, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983) (also finding racketeering injury indistinguishable from competitive or commercial injury); *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. at 1240; *Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Gitterman v. Vitoulis*, 564 F. Supp. at 48; *USASCO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 814 (W.D. Ky.), *aff'd on other grounds*, 689 F.2d 94 (6th Cir. 1982); *Crocker Nat'l Bank*, 555 F. Supp. at 49.

The following cases have rejected a "racketeering injury" requirement: *Mauriber v. Shearson/American Express, Inc.*, 567 F. Supp. at 1240; *Windsor Assocs., Inc. v. Greenfeld*, 564 F. Supp. at 278-79 (also finding racketeering injury "analytically indistinguishable" from argument that RICO applies only to organized crime); *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 567 F. Supp. 1146, 1157 (D.N.J. 1983).

Commentators too have disagreed about the propriety of a "racketeering injury" requirement. *Compare* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1109-14 (1982) (limitation unprincipled) [hereinafter "Note, Civil RICO"] *with* Comment, *Reading the "Enterprise" Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. L. Rev. 100, 126-32 (1981) (supporting a standing requirement); Bridges, *supra* note 6, at 71-73 (*id.*).

have split on whether there must be criminal convictions for the predicate acts prior to institution of a private civil RICO suit. *See* cases cited at *infra* note 42.

We have as yet little guidance from the Supreme Court as to which, if any, of these different understandings of RICO's private civil remedy is appropriate. In holding in *United States v. Turkette*, 452 U.S. 576 (1981) that the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises, and that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, 452 U.S. at 587, the Court said in reference to the civil remedies that "[a]s a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." It went on to say that "[t]he aim is to divest the association of the fruits of its ill-gotten gains." *Id.* at 585. The Court concluded that it is "untenable" that the existence of the civil remedies "limits the scope of this criminal provision." *Id.*

The Court recognized that Congress, in passing RICO, intended to "alter somewhat the role of the Federal Government in the war against organized crime," *id.* at 587, and rejected the lower court's view that in order to right "the balance between federal and state enforcement of criminal law" it was obliged to read narrowly the statutory definition of "enterprise." *Id.* at 586-87. However, the Court was only discussing congressional intention as to the criminal enforcement provisions of RICO, not the intended scope of the private civil remedy. *Id.* Similarly, the Court's invocation of the plain meaning rule as regards the Congressional definition of "enterprise" in 18 U.S.C. § 1961(4), 452 U.S. at 580-81, provides little or no guidance as to the handling of the

very real ambiguities, which we discuss below, surrounding the complex statutory scheme providing for the private civil remedy. *See Harper v. New Japan Securities International, Inc.*, 545 F. Supp. 1002, 1005-06 (C.D. Cal. 1982).[36]

Discussion

I. *Injury by Reason of Racketeering Activity.*

We agree with the district court that the appellant has failed to allege any injury to its business "by reason of a violation of section 1962," as required by section 1964(c). The "by reason of" standing limitation to RICO has been endorsed by a great many district courts. *See* cases cited in *supra* notes 33-34. They argue that the "by reason of" language was put into the statute by Congress as a way to limit standing to sue under RICO to people hurt by an injury of the type RICO was intended to prevent. RICO was intended not simply to provide additional remedies for already compensable injuries,[37] but rather to provide

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36 In another recent criminal RICO case the Court similarly rejected a narrow reading of the word "interest" in § 1963(a)(1). *Russello v. United States*, 104 S. Ct. 296, 300 (1983). As it did in *Turkette*, the Court relied upon the plain meaning of the statutory language, also making reference to the liberal construction clause in RICO. *Id.* at 302. The Court also repeated its conclusion that the legislative history of RICO suggests that Congress intended the criminal provisions to be given a broad construction. *Id.* at 302-03.

37 *United States v. Forsythe*, 560 F.2d 1127, 1135 (3d Cir. 1977) ("State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations; it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity."). *Cf. United States v. Bledsoe*, 674 F.2d 647, 659 (8th Cir. 1982) ("RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes."), *cert. denied sub nom. Phillips v. United States*, 103 S. Ct. 456 (1982).

added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

The justification for this limitation is not derived solely from the language of the statute.[38] Instead, many courts focus on the fact that the "by reason of" language is drawn directly from section four of the Clayton Act. In that act the language has been construed to require plaintiffs to allege and prove an "antitrust injury," *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* 429 U.S.

38 It can be argued that a "pattern of racketeering activity" is defined merely in terms of predicate offenses and nothing more, § 1961(1), (5), so the fact that racketeering activity must be proved under § 1964(c) does not in itself require that something other than the predicate offenses be proved. On the other hand the statutory definition states that a pattern "*requires* at least two acts of racketeering activity . . . ." 18 U.S.C. § 1961(5) (emphasis added). An argument can be made that the use of the word "requires" instead of the word "means" implies that Congress left it to the courts to define the contours of the concept of "pattern." *See* Bridges, *supra* note 6, at 64-65 & n.119. Here Senator McClellan's observations, quoted in *id.* at n.118, may assume importance:

> The [ACLU] offers an inaccurate and prejudicial criticism of title IX when it states that "pattern of racketeering activity" is defined as two or more acts of "racketeering activity," and worries that a person could be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses, one of which related to an interstate business. Again, a careful reading of title IX would have informed the union that a pattern under title IX is not defined as two or more acts of racketeering activity, but requires them.
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> . . . .
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> The term "pattern" itself requires the showing of a relationship, and the committee report . . . thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern and the ACLU's fears are unwarranted.

116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

477, 489 (1977), which the Supreme Court has defined as "injury of the type the antitrust laws were intended to prevent." *Id.* By analogy, then, the "by reason of" language in section 1964(c) is intended to limit standing to those injured by a "racketeering injury," by an injury of the type RICO was designed to prevent. *See, e.g., In re Action Industries Tender Offer*, 572 F. Supp. at 851-52; *Johnsen v. Rogers*, 551 F. Supp. at 285.

Two kinds of questions have, however, been raised in relation to finding a standing requirement analogous to the Clayton Act's in RICO's "by reason of" language. First, courts and commentators have argued that the legislative history demonstrates that Congress did not intend to have the Clayton Act's standing requirement applied to RICO. *E.g. Schact v. Brown*, 711 F.2d at 1357-58; Blakey & Gettings, *supra* note 6, at 1015-17 & nn.24-32, 1041. The second question has to do with defining precisely what is meant by a "racketeering injury."

One of the Senate predecessors to RICO was framed as an amendment to the Clayton Act. S. 2048, 90th Cong., 1st Sess. (1967). This approach was rejected by the House Judiciary Committee in part because it was thought that the strict standing requirements of the Clayton Act should not have to be met by plaintiffs suing under RICO. House Hearings, *supra* note 9, at 149 (Statement of the Antitrust Section of the ABA). Similarly, on the Senate floor a number of Senators explicitly rejected the idea of "imputing the great complexity of antitrust law enforcement" to RICO,[39] although this discussion did not refer to the *private* civil action which, as we have noted,

39 115 Cong. Rec. 9567 (1969) (Statement of Senator McClellan). *See also* 115 Cong. Rec. 6993 (1969) (Statement of Senator Hruska).

was added to the bill only after it had left the Senate. The legislative history suggests that it would therefore beinappropriate to carry over wholesale all of the elaborate antitrust standing case law onto RICO. It would no doubt violate both the congressional purpose and common sense to require RICO plaintiffs to allege an injury of the type the *antitrust* laws were designed to prevent to maintain a RICO suit.

On the other hand, there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the "by reason of" language. By borrowing language imposing a standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO.[40]

The question then becomes what kind of injury is a "racketeering injury"? As has been said, RICO was intended to "address the infiltration of legitimate business by organized crime." *Turkette*, 452 U.S. at 591. According to the congressional statement of findings and purpose, the Act was to seek to eradicate organized crime because "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations,

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40 Thus, in an interesting paper in the post-legislative history, the American Law Division of the Library of Congress, after reviewing the purposes of RICO and of the antitrust laws, concluded that "[g]iven the similarity of language and circumstances between the antitrust provisions and those of the Organized Crime Control Act, there is no reason to believe that many of these [antitrust] principles and problems would [not] be applicable to both [antitrust and RICO] types of cases." *Reprinted in* Victims of Crime, *supra* note 20, at 331. *See Landmark Savs. & Loan*, 527 F. Supp. at 208-09 ("Competitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same."). *See also* Bridges, *supra* note 6, at 68-73 & nn.133-34.

interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *See also* legislative history cited in *Bridges*, *supra* note 6, at 68-72 & nn.133-39. RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. It was to help solve this problem that Congress added RICO to the arsenal of weapons used to fight organized crime. It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.

This is, we repeat, by no means to say that standing to sue under RICO should be limited only to people who have standing to sue for a competitive injury under the antitrust laws.[41] This is so because Congress in promulgat-

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41 For example, recent antitrust cases which focus on market efficiency rather than on damage to business people, *see, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977), are not relevant to the requirements of RICO standing. Nothing in RICO suggests, then, that only competitors can sue, or that Congress in enacting RICO was more concerned with economic efficiency than with providing remedies for victims of organized crime. *See* Note, *Civil RICO*, *supra* note 35, at 1113-14 ("RICO's explicit aim to promote free competition focuses as much on insuring a fair market as on insuring an efficient one. Thus, the state should protect the plaintiff injured competitively by a corrupt business even at a cost to market efficiency.").

Similarly, claims alleging the kinds of business fraud which often affect competition should go forward under RICO even if in the particular case no harm to competition results, as, for example, when all competitors are being extorted from equally. For example, in *Hellenic Lines, Ltd. v. O'Hearn*, 523 F. Supp. 244 (S.D.N.Y. 1981), a company was forced to pay kickbacks to an illegal enterprise for required services. A RICO claim was allowed even though defendant claimed that the inflated price was still reasonable so that no injury to

ing RICO was addressing the kind of economic injury which has an effect on competition, but nowhere suggested that actual anticompetitive effect is required for suits under the statute. For purposes of clarity, it is better to identify the RICO standing requirement as a "racketeering injury" requirement rather than a "competitive injury" requirement, as the latter term may incorrectly suggest that all of the details of the antitrust law standing requirement are being incorporated by reference. This carries with it at least, as the trial judge found, the obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.

II. *Necessity of a Prior Conviction.*

In *Trane Co. v. O'Connor Securities*, 718 F.2d 26, 29 (2d Cir. 1983), we left "to another day" the question whether a prior criminal conviction is a prerequisite to a civil RICO action. We now hold that it is. A number of cases have discussed the problem with little or no analysis. Even the commentators who would call for an expansive reading of the Act have done likewise, merely citing those same cases in footnotes. *E.g.*, Note, *Civil RICO*, *supra* note 35, at 1103 n.17; Blakey and Gettings, *supra* note 6, at n.129. For reasons that appear below, we cannot agree with these decisions and commentators.

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competition had occurred. It was enough that the plaintiff's alleged injury was the *kind* of injury which Congress identified as threatening competition. The fact that the suit may not have been viable under the Clayton Act shows that the two standing requirements overlap but are not identical.

We do not in this business fraud case attempt to define the scope of the standing requirement when the RICO suit is based upon securities law violations.

A. *The Case Law.*

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), is the case most frequently relied upon by courts which have held that criminal convictions are not required before private civil actions may be maintained. *Cappetto*, however, dealt solely with the government's right, in the absence of a criminal conviction, to sue for an injunction under section 1964(1) to prevent or restrain violations of RICO. The case held that Congress was entitled to make civil equitable relief available to the government to prevent or restrain certain actions under subsection 1964(a). In so doing, the court relied on a long series of cases which hold that the government is entitled to bring civil suits for acts which are also punishable as crimes, especially when it is seeking remedial equitable relief and not punitive relief. 502 F.2d at 1356-57. Thus, far from determining the question of the intended or appropriate scope of the treble damage remedy provided to private parties under subsection 1964(c), *Cappetto* made no holding with respect to private civil actions. As a matter of policy, government actions and private actions are of course very different. Prosecutorial discretion, and in the case of RICO, guidelines from the Department of Justice, protect against overbroad use of RICO. *See United States Attorneys' Staff Manual, Executive Office for U.S. Attorneys, RICO Guidelines* (Jan. 30, 1981). There is no comparable way to limit private RICO.

Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978), did squarely hold that section 1964(c) "does not condition that cause of action in any way upon a previous conviction under the criminal provisions of the statute," and adds that it is only neces-

sary that the plaintiff prove the elements of the RICO action by a preponderance of the evidence in order to be awarded damages in a civil action. However, as support for these propositions it cites only to *Cappetto*. 452 F. Supp. at 1280. Almost all other cases that hold that criminal convictions are not necessary rely either on *Farmers Bank* or *Cappetto* and offer no other reasoning to support their conclusion.[42]

The only other argument put forward for the position that criminal convictions are not required for civil RICO suits is contained in *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982). In a footnote the court stated:

> Section 1962 merely describes acts that are "unlawful" under RICO. Section 1963 provides that violations of § 1962 are criminal, just as § 1964(c) provides that violations of § 1962 create a private right of action for damages. If Congress had intended to limit liability under § 1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963.[43]

42 *See, e.g., Glusband v. Benjamin*, 530 F. Supp. 240, 241 (S.D.N.Y. 1981); *Harper v. New Japan Secs. Int'l, Inc.*, 545 F. Supp. 1002, 1007 n.8 (C.D. Cal. 1982); *Mauriber v. Shearson/American Express, Inc.*, 546 F. Supp. 391, 396 (S.D.N.Y. 1982); *Heinhold Commodities, Inc. v. McCarty*, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979). *But see Van Schaick v. Church of Scientology of Cal., Inc.*, 535 F. Supp. 1125, 1137 n.12 (D. Mass. 1982) (dicta that criminal convictions may be required); *Kleiner v. First Nat'l Bank of Atlanta*, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981) (*id.*), *overruled on other grounds, Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983).

Certain other cases holding that criminal convictions are not required have relied in part upon the "liberal construction" language in *Turkette*, 452 U.S. at 580-81. *See USACO Coal Co. v. Carbomin Energy, Inc.*,689 F.2d 94, 95 n.1 (6th Cir. 1982); *cf. Glusband*, 530 F. Supp. at 241 (following *Turkette's* plain meaning analysis). For reasons we stated previously, we do not find that language in *Turkette* particularly helpful in analyzing this problem.

While this argument is, at least, based upon the statute, we think it is misguided. If Congress had referred to section 1963 in section 1964(c), the result would have been not only to require criminal convictions for the predicate acts before bringing a civil suit, but to require a conviction under *RICO*. By referring to section 1962 in section 1964(c), it is our view that Congress intended to refer to injuries caused by the "unlawful" pattern of racketeering, defined in section 1961(5) as "requir[ing]" two of the criminal acts listed in section 1961(1). Thus people injured by "racketeering activity" may sue, assuming they have standing to sue, whether or not the government has brought an action *under RICO* to punish that activity. As to whether that racketeering activity itself must already have been proven criminal, the question we are facing here, the reference to section 1962 in section 1964(c) provides no indication.

43 589 F.2d at 95 n.1.

Two other courts have forwarded versions of this same argument. *State Farm Fire & Cas. Co. v. Caton*, 540 F. Supp. 673, 675 (N.D. Ind. 1982); *Parnes v. Heinhold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980). Other courts have relied on *USACO* while holding or saying that criminal convictions are not necessary. *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 19 n.15 (2d Cir. 1983) (dicta), *cert. denied sub nom. Moss v. Newman*, 104 S. Ct. 1280 (1984); *Barker v. Underwriters at Lloyd's, London*, 564 F. Supp. 352, 356 (E.D. Mich. 1983); *In re Longhorn Secs. Litigation*, 573 F. Supp. 255, 270-71 (W.D. Okla. 1983).

B. *Statutory Analysis.*

1. *Language.* To determine the scope and content of the civil remedy, the proper place to begin analysis is, as always, the statutory language itself. To start, section 1964 itself draws several distinctions between the government and private persons. Subsection 1964(a) gives the district courts jurisdiction to "prevent and restrain violations" of section 1962; it is not a general grant of jurisdiction and does not relate to subsection (c). Subsection (b) permits the Attorney General to institute proceedings under the section; it was drawn when subsection (c) was not in the statute and relates back to subsection (a).[44]

Study of the particular words chosen by Congress in drafting section 1964(c) is also fruitful. Section 1964(c), as has been noted, "is modeled after, but is not identical to, section 4 of the Clayton Act."[45] Therefore, any variations between the language of section four of the Clayton Act and section 1964(c) of RICO are especially instructive.

44 It would be a strained construction to say that any person by virtue of § 1964(c), which gives such a person only a right to damages, would also have a right to sue for permanent injunctive relief under subsection (a). *See supra* text at note 24. The differences between the private remedy sections in the Clayton Act and in RICO are particularly significant here. There are specific Clayton Act provisions giving the government and individuals the right to bring actions for injunctive relief, 15 U.S.C. §§ 25-26 (government, private persons), something which is not set forth in RICO § 1964 or evidently recognized by the *Cappetto* court when it speaks of the Clayton Act's § 4. 502 F.2d at 1357.

Moreover, section 1964(a) speaks of "jurisdiction to prevent and restrain violations of section 1962," on its face allowing injunctions *before* the violations have occurred or criminal prosecution commenced. Subsection (c), on the other hand, speaks of injury "by reason of a violation of section 1962," language which at least suggests that the violation must be proved criminally before the action commences.

45 Blakey & Gettings, *supra* note 6, at 1040. *See* House Hearings, *supra* note 9, at 543-44 (ABA report). *Cf.* Bridges, *supra* note 6, at 68-70.

The Clayton Act provision reads in relevant part: "any person who shall be injured in his business or property *by reason of anything forbidden* in the antitrust laws may sue . . . ." 15 U.S.C. § 15(a) (1982) (emphasis added). RICO section 1964(c), on the other hand, reads: "Any person injured in his business or property *by reason of a violation* of section 1962 of this chapter may sue . . ." (emphasis added). The difference is instructive. It is possible to argue that "violation" is simply a shorthand way of saying "by reason of anything forbidden," and one could suppose that when the House of Representatives reinserted the treble damage private right of action provision which had been rejected by the Senate it approved this change in a desire merely to eschew surplusage.[46] But this interpretation does not seem as compelling as one which suggests that the change was made with a specific intent in mind—to require that conviction at least of the predicate acts be had before a civil suit may be brought by a private person.[47]

46 We are fully aware that the "by reason of a violation" language can be found in the earlier Senate and House bills which did contain private civil remedies. S. 1623, 91st Cong., 1st Sess., § 4(a) (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967); H.R. 19586, H.R. 19215, 91st Cong., 2d Sess. (1970). *See supra* note 18 for a discussion of these bills. Nevertheless, the question remains why the House chose this language over the language of the Clayton Act.

47 We note in the post-legislative history that this conclusion was rejected by the American Law Division of the Library of Congress in its comparative study of RICO and the Clayton Act, *see* Victims of Crime, *supra* note 20, at 323, 329, on the basis that "violation" is used elsewhere in the antitrust laws, e.g., in 15 U.S.C. §§ 4, 25, 26. But two of the provisions cited in that study have their own parallels in RICO: 15 U.S.C. §§ 4 and 25 are equivalents of 18 U.S.C. § 1964(a) giving district courts jurisdiction to prevent and restrain violations at the behest of the government. And the other Clayton Act provision cited, 15 U.S.C. § 26, which has no parallel in RICO, gives similar jurisdiction at the behest of private parties, a matter which the American Law Division study sought explicitly to remedy as to RICO. Thus, the American Law Division statement does not meet the argument based

It is helpful to look back to the definition in section 1961(1) of "racketeering activity," since we are referred to section 1962 by way of section 1964(c), and section 1962(a) makes "a pattern of racketeering activity" "unlawful" in certain circumstances. Section 1961(1) describes four distinct types of such activity. Those under subparagraph (A) include "*any act or threat* involving murder, kidnaping, gambling, arson, robbery, bribery, extortion or dealing in narcotic or other dangerous drugs, which is *chargeable* under State law" and is punishable by imprisonment for more than one year (emphasis added). The "racketeering activity" acts under subparagraph (B) include "*any act which is indictable* under" certain provisions of federal law including mail fraud and wire fraud, in addition to other typical organized crime activities (emphasis supplied). The predicate acts under section 1961(1)(C) are, as in subparagraph (B), "indictable" acts dealing with labor matters. Finally, the predicate acts under subparagraph (D) include "any *offense* involving fraud" in the securities or bankruptcy areas, or in the felonious dealing in narcotic or other dangerous drugs (emphasis supplied).

The difference between the "chargeable under state law" and "indictable under federal law" language can readily be explained by the fact that some matters even involving imprisonment for more than a year may be chargeable by information under state law, as in the State of Connecticut for example. The distinction between "indictable" acts under (B) and (C) or "chargeable" acts under (A), on the one hand, and "offense[s]" under subparagraph (D), on the other, is more troubling. An

on the difference in language between the treble damage private action provisions which are otherwise parallel, 15 U.S.C. § 15 and 18 U.S.C. § 1964(c).

"offense" speaks to conviction. An indictable or chargeable act refers obviously to an earlier stage in the criminal process. All these terms, however, speak along criminal rather than civil lines.

A person who is charged in a civil case with securities fraud (for example, by way of willful misrepresentations in a proxy statement), proof of which is by a preponderance of the evidence, can surely not be said to have committed "an offense," conviction of which requires proof beyond a reasonable doubt, with all of the traditional constitutional and other safeguards. Criminal violation of the securities laws occurs only with the requisite criminal scienter. Is one to be held liable under a lesser standard of proof in a private right of civil action and, not incidentally, thereby stigmatized as a "racketeer"? It is hard to believe that in adopting civil RICO Congress intended to permit proof of "willful" violations by only a preponderance of the evidence.[48] Otherwise, two misstatements in a proxy solicitation could subject any director in any national corporation to "racketeering" charges and the threat of treble damages and attorneys' fees.

As for the language "any act which is indictable" (or "chargeable"), conceivably Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies informations, are not required, since the acts need only be "indict*able*" or "charge*able*" (emphasis added). But a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether

48 The Securities and Exchange Act of 1934 makes only "willful" violations criminally punishable. Section 32(a), 15 U.S.C. § 78ff (1982). On "offense" under the securities laws in RICO, *see generally* Bridges, *supra* note 6, at 63-64.

an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts—proved by a preponderance of the evidence only—and say that these facts make out acts which are "indictable" or "chargeable." *See Kleiner v. First National Bank of Atlanta*, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981), *overruled on other grounds sub nom. Morosani v. First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983). In the case of indictments that is the purpose of grand juries. The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." Surely, being declared a "racketeer" or being held responsible for being one is being held to "answer for" an "infamous crime."[49] Whatever else one

49 The American Bar Association has recommended that the RICO statute be amended to replace the term "racketeering activity" with the phrase "criminal activity" as a way to resolve this problem. Report to the House of Delegates, 1982 ABA Sec. Crim. Just. Rep. 3-4 (Jan. 1982). *Cf. United States v. Guiliano*, 644 F.2d 85, 89 (2d Cir. 1981) (prejudicial taint inevitably surrounds label of "racketeer").

As we have indicated in *supra* note 24, there are potential constitutional problems created by the broad reading of RICO endorsed by many courts. At some point defendants are entitled to the constitutional protections of the criminal law regardless of how the government chooses to characterize a given cause of action. *See Boyd v. United States*, 116 U.S. 616, 634-35 (1886). Relevant factors in characterizing an action as "criminal" are the nature of the underlying offense, the stigma attached to the charge made, *In re Gault*, 387 U.S. 1, 23-25 (1967), the nature of the punishment authorized by the statute, *Trop v. Dulles*, 356 U.S. 86, 94-95 (1958), the intent of Congress in promulgating the statute, *id.*, and whether the government or a private party is bringing the action. *See generally* Note, *infra* note 59, at 210-12. Reading private civil RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law. Thus, the construction advanced in this opinion avoids serious constitutional questions.

may think of grand juries or the processes by which they pursue their deliberations, they may stand as a bulwark between the individual and the government. Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor.

2. *Intent*. But we need not rest the argument for this narrow interpretation of RICO on parsing of the words of the statute, since concededly they are ambiguous and could be construed to relate to underlying conduct. The structure of RICO as a whole leads one to the narrower interpretation requiring criminal convictions by a more direct route. The Act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal. Thus it has been noted by the very commentators who have most strenuously urged a broad reading of civil RICO that RICO did not itself "draw a line between criminal and innocent conduct," but rather "authorized the imposition of different criminal or civil remedies on conduct *already criminal*, when performed in a specified fashion." Blakey & Gettings, *supra* note 6, at 1032 (emphasis supplied).[50] In this sense RICO is significantly different from the antitrust laws, where it is possible to bring a civil action even in the absence of

50 This structure is, of course, altered to some extent by the provision which allows the government to seek injunctive relief in the absence of criminal convictions. As we have indicated, however, injunctive relief to *prevent* violations is simply a very different kind of remedy than a treble damages action and is accordingly subject to a unique regimen. It would be contrary to the entire purpose of equitable remedies if their utilization had to await the imposition of criminal sanctions.

The argument made in text is nowhere answered by our dissenting brother.

criminal conduct.[51] RICO liability simply does not exist without criminal conduct,[52] though of course, in a criminal RICO case, the proof of the predicate act convictions may be made under the same indictment, in the same trial and coordinately with the proof of the RICO offense(s). But in a civil context, there is no way to know whether the conduct in question is "already criminal," a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions. We conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c). Absent such explicit congressional direction, such a narrow reading of section 1964(c) best integrates that subsection into the entire structure of the Act. On the other hand, if the broad reading is accepted, problems are created of which there is no indication that Congress even dreamed.

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51 [There is] a significant distinction between section 1964 and the antitrust laws . . . . [Sherman Act] civil actions may be brought in cases in which criminal prosecution would not have been justified . . . . Thus, a civil action may succeed . . . [even] if the government [does] not show that the violation constituted a *criminal* act.

. . . .

Thus, *the charge that a section 1964 action is "inherently criminal" is true.* (emphasis added) (footnote omitted).

Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192, 208-09 (1975). *See also* Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L. J., Oct. 10, 1983, at 21, col. 1.

52 *United States v. Campanale*, 518 F.2d 352, 365 n.36 (9th Cir. 1975) ("The acts constituting racketeering activity must themselves be criminal offenses."), *cert. denied sub nom. Mathews v. United States*, 423 U.S. 1050 (1976); *Salisbury v. Chapman*, 527 F. Supp. 577, 579 (N.D. Ill. 1981) ("RICO does not contain any substantive prohibitions unknown to other sections of federal criminal law. Instead, it confers upon victims of certain *criminal violations* the right to proceed in a civil suit against the offenders." (Emphasis added.))

Chief among these problems, as the foregoing argument suggests, is the proper burden of proof in proving predicate offenses in the absence of a criminal conviction. It is not surprising that courts which have allowed civil suits to go forward have wrestled with the proper burden of proof required to maintain the action. The problem, of course, relates to the burden to which a plaintiff must be put to prove that a defendant is a "racketeer" because he has committed two predicate acts. At least three different standards of proof are within the realm of plausibility: proof beyond a reasonable doubt,[53] proof by clear and convincing evidence,[54] and proof by preponderance of the evidence.[55] Courts in addition have indicated that probable cause must be alleged with reference to the predicate acts, although how this is meant to relate to the burden of the plaintiff at trial remains something of a mystery.[56]

Insofar as the RICO scheme calls for only criminal conduct to be punished, it thus appears that in the

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53 No court to date has held that the criminal burden is appropriate. The standard is mentioned in Matz, *supra* note 51. *See also* Note, *Enforcing Criminal Laws Through Civil Proceedings: Sec. 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 Tex. L. Rev. 1055, 1062 n.52 (1975) ("Where, as with section 1964, proof of a violation of the statute requires proof of the commission of a crime, the defendant should arguably receive the benefit of a traditional criminal trial.").

54 *Swanson v. Wabash, Inc.*, No. 83-C-0459 (N.D. Ill. Dec. 16, 1983) (suggesting appropriateness of clear and convincing standard, citing Matz, *supra* note 51, at 21, col. 1).

55 *Farmers Bank of Del. v. Bell Mortgage Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978); *Parnes*, 487 F. Supp. at 647 ("civil burden of proof"); *State Farm Fire & Cas. Co.*, 540 F. Supp. at 676 (citing *Farmers Bank*); *Heinhold Commodities*, 513 F. Supp. at 313 (*id.*); *Eaby v. Richmond*, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983).

56 *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667, 682-83 (N.D. Ga. 1983); *Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co.*, 558 F. Supp. 1042, 1045 (D. Utah 1983).

absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in proving that criminal conduct. Yet it would be extraordinarily difficult for juries to understand the different burdens of proof required for different elements of a civil case. Moreover, if Congress had intended to impose such an unusual scheme, one would think that some suggestion of it would have occurred in the extensive legislative history. Instead, that history indicates that Congress assumed a preponderance standard was appropriate.[57] The most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit.

In addition to burden of proof problems, allowing private civil RICO claims to proceed without criminal convictions would make a hash of the very "liberal construction" provision said to require just such a result. It has been argued by the leading proponents of a broad reading of civil RICO that liberal construction is appropriate because RICO merely penalizes conduct already

57 House Hearings, *supra* note 9, at 106-07, 664, 687. All of this discussion referred only to the government's private action. Nevertheless, some witnesses in the House hearings assumed that the "pattern of racketeering activity" element in a civil suit would have to be proved beyond a reasonable doubt. *See id.* at 328-29 (Report of the Association of the Bar of the City of New York).

Our dissenting brother does not directly confront the burden of proof problems except by apparently suggesting that a preponderance standard is sufficient (dissenting op., page 6), but that if it is not some heightened standard would be (dissenting op., pp. 7-8). Having in mind Congress's omission to examine this problem except very obliquely, as we point out in text, to attempt to draw a jury charge dealing with different burdens of proof is not only a very difficult task, likely to cause great confusion, but also not a little bit of the judicial legislation Judge Cardamone decries. And to accept the proposition that you can prove *criminal* acts, notes 50 *supra* and 58 *infra*, by a preponderance of the evidence raises its own problems of a higher magnitude, as we point out in text.

criminal; thus, it is said, requirements of strict construction have already been applied in construing the predicate criminal offenses.[58] Acknowledging that due process, of course, requires that criminal statutes be strictly construed, *e.g.*, *Dunn v. United States*, 442 U.S. 100, 112 (1979), these proponents argue that since proof of criminal conduct could already be presumed in RICO suits, there would then be no need to "*further* restrict the scope of the statute by *re*applying these policies." Blakey & Gettings, *supra* note 6, at 1032 (emphasis added).

In the civil context, absent predicate act convictions, the policy of strict construction simply cannot be implemented. As one commentator has suggested, "[i]f the liberal construction clause is applicable to determine the scope of criminal liability under Title IX, the provision is therefore unconstitutional." Tarlow, *RICO Revisited*, 17 Ga. L. Rev. 291, 309 (1983). How could the line be crossed into the sphere of criminality simply by bringing a civil action? It is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action. RICO's statutorily mandated requirement

58 *See* Blakey & Gettings, *supra* note 6, at 1031-32:

> Congress believed that the normal practice of following a policy of strict construction . . . was inappropriate in the context of RICO, since *RICO did not draw a line between criminal and innocent conduct.* Instead, *RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion.* Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," *and the line had been crossed into the sphere of criminality,* it was *inappropriate to further restrict the scope of the statute by reapplying these policies.*

(Emphasis added) (footnote omitted). This point is simply not addressed by our dissenting brother. See note 50 *supra*.

of liberal construction cannot fairly be relied upon in interpreting section 1964(c) without undermining its very justification. Nor is this anomaly surprising given that private civil RICO was added to RICO in the House as an afterthought, subsequent to the inclusion of the liberal construction clause in the Senate version of the bill. The statute, we repeat, is simply not a symmetrical whole.

In sum, after reviewing the words and structure of the enacted statute, its legislative history, and the prior case law interpreting the statute, we find it impossible to believe that in enacting RICO, Congress intended to sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet of the treble damage remedy provided by section 1964. To bring a private civil action, there must be a "violation," that is, criminal convictions on the underlying predicate offenses. Of course, a conviction under RICO itself will do, a fortiori. Moreover, plaintiffs must satisfy the standing requirement set out in this opinion and by the court below, a requirement that, as a practical matter, will not create an added barrier to a plaintiff's suit following upon criminal convictions under RICO, though it may present a problem in the case of convictions only of predicate acts, a problem which we need not here address.

Neither should the criminal conviction requirement create a significant additional barrier to a RICO plaintiff with proper standing to sue. Even without such a requirement, if a criminal prosecution is possible, it is unlikely that private RICO actions can progress very far, since defendants will block discovery by invoking the Fifth Amendment. *See* Bridges, *supra* note 6, at 53 n.66.

We therefore reject arguments based on the supposed "plain meaning" of a statute that, whatever its virtues and vices, is hardly a model of clarity. Being required,

then, to look to the legislature's intent as demonstrated in the legislative history, we find nothing conclusive, but discern in the legislative silence a purpose that is entirely at odds with the open-ended reading of the statute adopted by a number of the courts and promoted by certain commentators. The legislative history indicates that the private action provision is modeled upon the Clayton Act, and we hold that standing requirements analogous but not identical to those in the Clayton Act should be required in RICO. We also note that the civil RICO provisions differ in some significant ways from the Clayton Act provisions.[59] In particular, the Clayton Act allows suits in the absence of criminal conduct, and therefore obviously in the absence of criminal convictions. Private civil RICO, on the other hand, is designed only to penalize conduct already determined to be criminal. In addition, the analysis of the RICO private treble damage provision must necessarily be differentiated from analysis of the injunctive provisions of RICO, both because of the differences between the government and a private party as a plaintiff, and because of the inherent differences between injunctive and punitive damages relief. Finally, we have tried to suggest that RICO's "liberal construction" clause actually requires that criminal convictions be obtained before civil suits under section 1964(c) commence.

We need not rest the argument on the burdens to which the courts would otherwise be subjected, though other things being equal that might carry weight. We do strongly suggest, however, that if Congress had intended

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59 Proponents of a broad reading of the statute apply Clayton Act provisions by analogy when they suggest that since criminal convictions are not required there, they should not be required under RICO. At the same time they urge that the Clayton Act standing provisions should *not* be applied in interpreting RICO.

to permit defendants in every "garden-variety" fraud or securities violation case to be stigmatized as "racketeers," on the basis of a preponderance of the evidence, it would have said so in plainer language than it did. Before we impute to Congress the intention of federalizing a large portion of the common law which, since the time of the Constitution, has been left to the courts of the several states, and of providing treble damages and attorneys' fees for violations of these laws, or of altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils, we will require more explicit language from Congress indicative of such intent.

Judgment affirmed.

CARDAMONE, *Circuit Judge*, dissenting:

I disagree with the majority's conclusion that this Court should create a requirement of prior criminal conviction for the predicate acts forming the pattern of racketeering activity for all civil RICO claims. In so doing, the panel majority takes this Circuit far from the shores of principled and disciplined reasoning, and leads it unnecessarily into a sea of uncertainty. In the panel's view, Congress would have intended—had it thought about the implications of § 1964—that prior convictions be required. Not only does the majority turn the ordinary rules of statutory construction on their head by ignoring the plain meaning of the statutory language, but it also ignores the sound policy reasons for permitting civil RICO cases to proceed absent prior convictions for the predicate acts. In my view, the civil RICO provisions

mean just what they say. Because these and other considerations have convinced me that the majority has crossed the line and trespassed in an area exclusively reserved to Congress, I dissent.

I. *Prior Criminal Conviction Requirement*

Looking at the reasoning that creates a "prior predicate act criminal conviction" requirement one is struck that it—in Alice's words—gets "curiouser and curiouser." [1] No support for this proposition is found in the statute or its legislative history. Almost none of the decisions or the commentators argue for such drastic redrafting of the statute In fact, they support the opposite conclusion, *i.e.* that no prior conviction is necessary to bring a civil claim under RICO.

Along the way to reaching its novel conclusion, the panel misconstrues Congress' reasons for the enactment of this statute and makes a number of faulty assumptions. The panel majority's position seems bottomed on: (1) disapproval of cases that have taken a contrary view; (2) a view that Congress did not give civil courts power to decide when acts are "indictable" or "chargeable"; (3) a view that § 1964 would constitute an unconstitutional "quasi-criminal" statute were a prior criminal conviction for the predicate acts not required; (4) a fear that defendants will be "stigmatized" by a civil "conviction" for racketeering activity; and (5) analysis based on the word "violation" contained in § 1964. I propose to deal with each of these premises *seriatim*.

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1 L. Carroll, *Alice's Adventures in Wonderland*, (Children's Classic ed.) 25.

(1) *Disapproval of Contrary Decisions*

The majority begins by analyzing those decisions that have refused to adopt a prior criminal conviction requirement, and disapproves of them because they supposedly are not well-reasoned. For example, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) is dismissed almost without comment because "*Cappetto* made no holding with respect to private civil actions." Others are discarded because they merely cite to *Cappetto*. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982), which rejected a prior conviction requirement, and reasoned that Congress would have defined the § 1964 "violation" differently had it desired such a requirement, is labelled "misguided."

This panel's evaluation of *Cappetto* puts it at odds with other panels of this Circuit that have cited that decision with apparent approval in other respects. *See United States v. Huber*, 603 F.2d 387, 393 (2d Cir. 1979), *cert. denied*, 445 U.S. 927 (1980); *United States v. Altese*, 542 F.2d 104, 107 (2d Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977). *Cappetto* involved a government prosecuted civil RICO claim. Ordinarily more, not less, protection is expected for a defendant when the government is plaintiff. When the plaintiff is a private party, as here, the quick dismissal of *Cappetto* totally ignores the "private attorney general" rationale built into RICO.

Discarding the numerous decisions of other courts that have not raised the bar of a prior conviction requirement will not make them go away. Virtually every court that has directly addressed the issue has decided no prior conviction is required. *E.g.*, *State Farm Fire and Cas. Co. v. Estate of Caton*, 540 F.Supp. 673 (N.D.Ind. 1982)

(holding no prior conviction is required based on statutory interpretation); *Farmers Bank of State of Del. v. Bell Mtg. Corp.*, 452 F. Supp. 1278, 1280 (D. Del. 1978) (§ 1964(c) "does not condition that cause of action in any way upon a criminal previous under the criminal provisions of the statute"). *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983) (Civil RICO action available "without any requirement of a prior criminal conviction for that conduct," citing *USACO*, *supra*). *Morosani v. First Nat'l Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983) (overruling *Kleiner v. First Bank National Bank*, 526 F. Supp. 1019 (N.D. Ga. 1981) without discussing prior criminal conviction dictum in *Kleiner*); *Parnes v. Heinold Commodities, Inc.*, 487 F. Supp. 645, 647 (N.D. Ill. 1980); (private RICO action need not be preceeded by criminal conviction). The majority's dismissal of these holdings as uninformed or as simply "following *Cappetto*" ignores the obviously simple explanation for their resounding rejection of any prior conviction requirement—it does not appear in the statute.

(2) *"Indictable" or "Chargeable" Acts*

Congress, the majority further tells us, did not intend to give civil courts power to determine whether an act is 'indictable' absent a properly returned indictment or 'chargeable' absent an information." How can this view be correct? To begin, the words themselves connote the contrary—*i.e.*, Congress did not use the phrase "for which an indictment or information has been *returned* or *filed*"; much less did it say "for which the defendant has been criminally *convicted*." More significantly, Congress clearly used the terms "indictable" or "chargeable" in

reference to "acts" forming a pattern of racketeering activity under § 1961, to which sanctions specifically labelled as "civil remedies" were then directed. To stretch this language into a requirement that a prior *conviction* must be obtained strains credulity. Had that been Congress' aim, § 1964's title would have been "Post Criminal Conviction Civil Remedies," not "Civil Remedies."

Further, the statute as Congress enacted it does not require civil courts to determine that the RICO predicate acts are in fact criminal acts. All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions. The use of criminal and civil sanctions for the same conduct is common. Congress has frequently enacted legislation giving private litigants civil remedies for acts which may also be punished criminally. In addition to the antitrust example, Congress has provided for multiple damages, statutory punitive damages, civil penalties and counsel fees in scores of statutes, including *inter alia*, the patent (35 U.S.C. § 281) and trademark laws (15 U.S.C. § 1117), the Truth in Lending Act (12 U.S.C. § 1640), the water pollution control statute (33 U.S.C. § 1321), the false claims statute (31 U.S.C. § 3729), the wiretap statute (18 U.S.C. § 2520), and the tax laws (26 U.S.C. 6653(b)). In some of these areas, Congress has gone further and accorded to the *government* a civil remedy for acts that are also punishable under federal criminal law. *Helvering v. Mitchell*, 303 U.S. 391 (1938) (after an acquittal for criminal tax fraud, the government obtained a 50 per centum penalty in a civil proceeding against the taxpayer and the court held this a civil, not criminal, sanction); *see One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (*per curiam*) (forfeiture proceeding, civil in nature, not barred

under Double Jeopardy Clause after defendant's acquittal on criminal charges). Rather than asking what kind of sanctions, *i.e.*, criminal or civil, are imposed against a defendant, the majority mistakenly focuses on the nature of the proceeding taken under § 1964. Here the sanction is treble damages. Treble damages have been part of our jurisprudence for centuries—since first appearing as a remedy for waste in the Statute of Gloucester (1278)—and they have never been viewed as "criminal" sanctions.

(3) *Constitutionality of § 1964 Absent Criminal Conviction*

As just noted, the majority analyzes a proceeding under § 1964 and implicitly finds it "quasi-criminal." It then seems to conclude that such finding necessitates holding the section unconstitutional were a prior criminal conviction not to be required. If true, this implicit conclusion is at odds with analagous case law in such areas as civil forfeitures, penalties and deportation cases which teaches that the correct procedure is for a court in a civil case to assure, on a selective basis, the existence of certain procedural safeguards, that would otherwise be applicable only in criminal cases. That is, only those criminal procedural remedies necessary to protect a defendant are required in the civil action. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886); *Lopez-Mendoza v. I.N.S.*, 705 F.2d 1059 (9th Cir. 1983) (*en banc*) (applicability of Fourth Amendment exclusionary rule in civil deportation proceeding), *cert. granted*, 52 U.S.L.W. 3509 (U.S. Jan. 9, 1984). *Bramble v. Richardson*, 498 F.2d 968, 973 (10th Cir.) (rejecting claim that *In re Winship*, 397 U.S. 358 (1970), requires proof beyond a reasonable doubt in a forfeiture proceeding), *cert. denied*, 419 U.S. 1069 (1974); *accord, United States v. Regan*, 232 U.S. 37 (1914)

(standard of proof in action for penalty for violation of Alien Immigration Act is preponderance of the evidence). *Cf. In re Ruffalo*, 390 U.S. 544, 552 (1968) (absence of fair notice of charges deprived petitioner of due process in disbarment proceeding). Close to 90 years ago the Supreme Court rejected the view that a civil forfeiture proceeding of the type involved in *Boyd v. United States, supra*, is a "criminal prosecution" in which the Sixth Amendment right of confrontation is implicated. *United States v. Zucker*, 161 U.S. 475, 482 (1896). Despite this teaching, the panel holds in effect that § 1964 is "criminal" for *all* purposes by requiring a prior criminal conviction before a civil RICO plaintiff can sue.

Thus, even accepting *arguendo* the view that § 1964 cannot be constitutionally applied in the absence of unspecified safeguards, the proper course is not to require a prior criminal conviction, but to insist on application of those safeguards (*e.g.*, the exclusionary rule, a heightened standard of proof or other criminal protections) within the context of a civil proceeding. The majority's response that imposing criminal safeguards in a civil case would confuse juries is not borne out in practice. Juries already apply heightened standards of proof to specific issues, in fraud, defamation, paternity and other types of civil actions. *See McCormick on Evidence* §§ 339-40 (2d ed. 1972) (citing cases).

Moreover, the Supreme Court has outlined the proper method of analysis for challenges to statutory civil remedies on the ground they are "quasi-criminal" or sufficiently "punitive" to require the procedural protections of a criminal trial. In *United States v. Ward*, 448 U.S. 242 (1980), the Court analyzed a challenge to section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA) which permitted the government to assess a

civil penalty of up to $5000 for each violation of the FWPCA. To decide whether a statute is "civil" or "criminal" involves a two-step test: first, courts must examine whether Congress indicated a preference for one label or the other; second, where Congress has signalled a preference for a civil penalty, there must be further inquiry to determine whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." *Id.* at 248-249. The Court concluded after considering the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), that the penalty in *Ward* was analagous to traditional civil damages and held it not sufficiently punitive to require Fifth Amendment criminal safeguards. *United States v. Ward, supra*, 448 U.S. at 251. Justice Blackmun's concurrence emphasized "that monetary assessments are traditionally a form of civil remedy" and found it significant that the FWPCA § 311(b)(6), like 18 U.S.C. § 1964, does not provide for "an affirmative disability or restraint" (such as imprisonment, deportation or disbarment). *Id.* at 257 (Blackmun, J.) (concurring).

More recently, in *United States v. One Assortment of 89 Firearms*, 52 U.S.L.W. 4228 (U.S. Feb. 22, 1984), the Supreme Court held that neither the Fifth Amendment double jeopardy clause nor collateral estoppel bars a forfeiture proceeding where the defendant in the prior criminal proceeding was acquitted. A unanimous Court applying the two-level *Ward* test indicated that even "discouraging unregulated commerce in firearms" and "removing [them] from circulation" are remedial, not punitive, purposes. *Id.* at 4231. The Court stressed that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," (*citing Helvering v. Mitchell, supra*) and held forefeiture to be a "separate civil sanction, remedial in nature." *Id.*

Applying the *Ward* test to § 1964 demonstrates that it is not a "quasi-criminal" statute even for purposes of Fifth Amendment guarantees, much less all criminal protections. The remedial purpose expressed in the statute is evident from its legislative history. Congress specifically provided that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, 84 Stat. 941 (1970) § 904(a). Section 1964 is designed to *compensate* private parties who are victims of tortious activity. *See United States v. Bornstein*, 423 U.S. 303, 314 (1975) (double damages under False Claims Act designed to ensure government is made completely whole); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943) (holding that double damages under False Claims Act are compensatory even if recovered by federal government). Its treble damage provision is therefore primarily remedial, and only partly punitive. The recovery in excess of actual damages constitutes statutory punitive damages designed in part to punish the defendant for tortious conduct, but traditionally allowable in civil proceedings without special criminal law safeguards. *See Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885) (multiple damages partly compensatory, partly punitive). Thus, § 1964 is "primarily remedial" under the Supreme Court's tests in *Helvering* and *Ward* because its principal purposes are to compensate victims of racketeering activity and to encourage them to vindicate their rights. In serving as private attorneys general, civil RICO plaintiffs aid in the eradication of such activity. In short, Congress' "civil" and "remedial" labels should not therefore be disregarded.

The majority apparently faced the dilemma of either upholding this statute as written or declaring it unconstitutional as punitive and hence quasi-criminal in nature. It

chose neither of these straightforward alternatives. It specifically rejected the former. And, since a statute as written may be held unconstitutional only if the challenger presents "the clearest proof" of it, *United States v. Ward*, *supra*, 448 U.S. at 249 (quoting *Flemming v. Nestor*, 363 U.S. 603, 617 (1960)), and because such proof is absent here, it could not choose the latter. Instead, to resolve the problem, the majority inserts the prior criminal conviction requirement to avoid perceived "serious constitutional questions." The premise is flawed because this course of "avoidance" has actually created a constitutional question of even greater significance. Addition of this new requirement to civil RICO—one which Congress did not vote on and which the President did not endorse—has raised a question as to whether such judicial creativity is an unwarranted and unconstitutional intrusion into the legislative process.

(4) *Stigma*

The panel opinion stresses a fear that defendants will be "stigmatized" by their "indictment" at the hands of a "one-man grand jury" for racketeering activity. Yet, stigma alone ordinarily does not suffice to convert a proceeding from civil to criminal. *See Ullman v. United States*, 350 U.S. 422 (1956) (contempt conviction for refusing to testify before grand jury upheld following grant of immunity over claim defendant would be stigmatized by revealing past connection with the Communist party). One commentator observed that the holding of *In re Gault*, 387 U.S. 1 (1967), relied on by the majority, has been largely limited to sanctions threatening loss of liberty, and that stigma alone does not trigger the need for criminal safeguards. Note, *Organized Crime and*

The Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity," 124 U.Pa.L. Rev. 192, 214-15 (1975).

Further, the majority's sensitivity to the stigma that may attach to decent citizens named as defendants in civil RICO cases seems a bit overstated. Today, defendants in civil suits are labelled as violators of environmental laws when pumping coal by-products into the atmosphere, despoilers of our rivers when emptying oil from their tanker's bilges, adulterers in state divorce actions, and killers in vehicular wrongful death actions. The allegations of the civil complaint do not make these citizens criminals, although their conduct may well subject them to separate criminal prosecutions. Why the outcry over RICO? I, for one, believe the public is sophisticated enough to distinguish between a criminal conviction and a civil claim. To be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it. Repeated often enough, it will either lose its effect as a settlement weapon or create enough public pressure to cause Congress to amend the statute. Again, it is not for this Court to alter the statute.

(5) *Use of Word "Violation"*

The opinion also places heavy reliance on Congress' use of the term "violation," and finds this word supports its thesis for a prior criminal conviction. In *Ward*, the statute also specifically referred to "violations" of the FWPCA. That Court notably attached no special significance to this term, presumably because the word "violation" is commonly used to designate civil wrongs.

Finally, the effect of this ruling will leave victims of those defendants whose activities were at the heart of Congress' concern without the remedy Congress envi-

sioned. Regardless of whether a defendant is a member of an organized crime family and no matter how lawless his pattern of racketeering activity may be, if he escapes conviction—through acquittal, a beneficial plea, or a decision not to prosecute—then the remedy granted the victim of these activities is lost.

II. *Racketeering Injury*

Concern that the RICO civil remedy will permit recovery of treble damages and attorneys' fees in every "garden variety" civil fraud case leads the majority to impose an additional standing requirement. Limiting RICO's broad reach by requiring, for example, an "organized crime" connection was rejected by Congress and by this court, *see Moss v. Morgan Stanley*, *supra*, 719 F.2d at 21 n. 17. Similarly, a "competitive injury" requirement has been rejected in the Seventh and Eighth Circuits. *Schacht v. Brown*, 711 F.2d 1343, 1359 (7th Cir.), *cert. denied*, 104 S.Ct. 508, 509 (1983). *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982), *aff'd in part on rehearing en banc*, 710 F.2d 1361 (8th Cir.), *cert. denied*, 104 S.Ct. 527 (1983). The Supreme Court has specifically rejected an approach that would require an allegation that the enterprise be "illegitimate." *United States v. Turkette*, 452 U.S. 576, 586-87 (1981).[2]

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2 I cannot agree with the majority's view that *Turkette* and other Supreme Court cases in the criminal area have no application to the issues raised on this appeal. In the first place, *Turkette* itself specifically refers to the civil provisions, noting that they "could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." *Id.* at 585. Further, the majority's concerns over "federalization" of the common law of fraud are identical to the concern in *Turkette* regarding the balance between federal and state enforcement of criminal law, which the Supreme Court noted was considered specifically by Congress, and which provided no basis for courts "to restrict the application of the statute." *Id.* at 587.

What remains is the theory adopted by some courts and that, together with the prior conviction requirement, the majority embraces here. That is, there must be an allegation of an injury from the "racketeering enterprise," a so-called "racketeering injury." Such has also been described as an injury "by reason of conduct the RICO act was designed to prevent," and as "something more than" the injury caused by the predicate acts alone. How one can distinguish between the injury caused by the predicate acts and the injury done by the enterprise is not explained. My colleagues state that "only when injury caused by this *kind of harm* can be shown" (emphasis added) does a plaintiff have standing under § 1964. "This kind of harm," in turn, occurs when "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors." This formulation is no more than a euphemism for an "organized crime" nexus requirement that should not be adopted by this Court after its rejection by the lawmakers. Other courts, the statute's congressional sponsors and commentators do not assign to civil RICO a scope on such a lilliputian scale.

In *Schacht v. Brown*, *supra*, the Seventh Circuit evaluated a similar standing requirement and stated that one trouble with "judicial pruning of RICO's civil provisions . . . where business fraud is alleged [is that] . . . there is simply no legitimate principled criterion" that accomplishes the distinction between ordinary "garden variety" fraud and fraud by an organized crime syndicate. *Schacht*, 711 F.2d at 1356. The *Schacht* court concluded that since the organized crime limitation on civil RICO had been rejected, it did not want it "revived under the

guise of determining the kinds of activity covered by RICO." *Id. See Ralston v. Capper*, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983) (racketeering enterprise injury "undefined"). *Accord*, Note, *Civil RICO and "Garden Variety" Fraud—A Suggested Analysis*, 58 St. John's L. Rev. 93, 107-08 (1983). *See also Bennett v. Berg*, *supra*, 685 F.2d at 1059 (rejecting "racketeering injury" requirement which is just another way of arguing that no "enterprise" existed). *Hokama v. E.F. Hutton & Co.*, 566 F. Supp. 636, 643 (C.D.Cal. 1983) (racketeering enterprise injury "little more than indirect statements" of requirement of "a 'nexus to organized crime' "). *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1353 (E.D.Pa. 1983) (cases do not make clear "what that 'something more' would be"); *Windsor Associates, Inc. v. Greenfield*, 564 F. Supp. 273, 279 (D.Md. 1983) (racketeering enterprise injury "analytically indistinguishable" from organized crime requirement).

Again, the majority's reliance on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), is misplaced for two reasons. First, Congress, at the suggestion of the ABA Antitrust section, indicated an intent *not* to incorporate technical antitrust standing and proximate cause notions into § 1964. *See* 115 Cong. Rec. at 6995 (1969) (discussing private civil actions). Second, in *Brunswick*, the Court found no clear expression of Congressional purpose to allow suits for "losses which are of no concern to the antitrust laws." *Brunswick*, 429 U.S. at 487. Fraud, however, was one of Congress' specifically targeted activities in enacting RICO, and plaintiff has alleged injury from fraudulent conduct. Whatever *Brunswick's* contours may be, its holding has no application where injury from two acts of mail or wire fraud is alleged, since such injury *is* of the type RICO was

"intended to prevent and that flows from that which makes defendants' acts unlawful," *id.* at 489.

To cast a net sufficiently wide to catch organized criminals, Congress took the calculated risk that others, whose activities are chargeable as crimes under other federal or state laws, would also be netted. Courts should not "creat[e] standing requirements that would preclude liability in many situations in which legislative intent would compel it." Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982). *See Moss v. Morgan Stanley, Inc.*, *supra*, 719 F.2d at 21. As with the majority's prior conviction requirement, the danger is that the racketeering injury standing requirement might well exclude plaintiffs in other cases where defendant's conduct "would be near the heart of Congress' concern." *Mauriber v. Shearson/American Exp., Inc.*, 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983).

Finally, despite the majority's thesis that the House of Representatives was unaware of the consequences of civil RICO, Congressman Poff, its sponsor, stated:

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime—as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344. Senator McClellan further noted that RICO "will have some application to individuals who are not themselves members of LaCosa Nostra

or otherwise engaged in organized crime." 116 Cong. Rec. at 18,945 (1970). Congress recognized the possibility of enacting a statute aimed only at "mobsters" or organized crime members and *consciously* chose not to do so. The majority simply rewrites the statute in a manner Congress rejected under the guise of restricting § 1964 to "mobster" activity. Congress chose means to achieve its ends that imposed a risk of RICO liability on those like appellee Imrex in this case. The allegations alleging wire and mail fraud against defendant Imrex—assumed on a motion to dismiss to be true—are indictable offenses. Fraud is a typical activity of organized crime and Congress specifically noted it in its statement of findings and purpose. Pub. L. No. 91-452, § 1. 84 Stat. 941 (1970). The legislative branch fully considered the possibility of vexatious litigation and took that risk advisedly. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970). Moreover, since the lawmakers explicitly provided in § 1964(c) for a private right of action, quite distinct from one judicially inferred, the judiciary's duty is to administer the law Congress passed and to defer its views on the policy considerations to the legislature. Note, *Civil RICO*, *supra*, 95 Harv. L. Rev. at 1117. Judicial creativity can only lead to inconsistency and confusion in the application of civil RICO. Whatever limitation is made should come not from the courts, but from Congress.

Accordingly, I vote to reverse the order appealed from and would reinstate the complaint.

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK (GLASSER, J.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

82 Civ. 2161

SEDIMA S.P.R.L.,

Plaintiff,

-against-

IMREX COMPANY, INC., GIDON ARMON, and JACK ARMON,

Defendants.

GLASSER, United States District Judge:

This suit arises out of the allegedly fraudulent activities of defendant corporation, a New York exporter of aviation parts, in its dealings with plaintiff, a Belgian supplier of equipment to aerospace and defense industries. The two companies entered into a joint venture for the purpose of supplying component parts to a European customer. Defendant allegedly sent inflated copies of purchase orders and credit memos to plaintiff, thereby receiving reimbursements from plaintiff in excess of its actual costs. Defendant has now moved to dismiss plaintiff's complaint to the extent that it seeks recovery under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1962. For the reasons set forth in this opinion, defendant's motion to dismiss is granted.

Memorandum and Order

To recover under RICO, a plaintiff must allege that the defendant, through the commission of two or more acts constituting a pattern of racketeering activity, invested or participated in an enterprise, the activities of which affect interstate or foreign commerce. 18 U.S.C. §1962.[1] In addition, the plaintiff must allege that he was "injured in his business or property by reason of a violation of Section 1962." 18 U.S.C. §1964(c). Plaintiffs who successfully allege RICO violations can recover treble damages, including reasonable attorneys' fees. 18 U.S.C. §1964(c). In the instant suit, plaintiff alleges that the mailing of fraudulent purchase orders and credit memos by defendant constituted predicate acts upon which a RICO claim can be based.[2]

Most of the grounds asserted by the defendants for dismissing the RICO complaint have been rendered inapposite by the Second Circuit's recent opinion in *Moss v. Morgan Stanley, Inc.*, 719 F. 2d 5 (2d Cir. 1983). The court stated that: (1) RICO claims need not be grounded in allegations that the defendant is affiliated with "organized crime;" and (2) the racketeering enterprise need not have an economic significance apart from the pattern of racketeering activity. *Id.*, at 20.

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1. 18 U.S.C. §1962(b) provides in full that:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

2. 18 U.S.C. §1961(1)(d) lists several violations that would constitute "racketeering activity," including any act indictable under 18 U.S.C. §1341 (relating to mail fraud) and 18 U.S.C. §1343 (relating to wire fraud).

The focus of this opinion thus shifts to one of the defenses not addressed in *Moss:* failure to allege properly a RICO-type injury. Several courts have stated that in order for an injury to be "by reason of a violation of Section 1962," something more or different than injury that would result from the predicate acts must be shown by the plaintiff. *See Bankers Trust Co. v. Feldesman,* 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983); *North Barrington Development, Inc. v. Fanslow,* 547 F. Supp. 207, 210-11 (M.D. Ill. 1980); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981). Underlying this argument is the concern that RICO "was simply not intended to provide a plaintiff with a windfall recovery for ordinary injuries that are otherwise compensable." *Bankers Trust, supra,* 566 F. Supp. at 1241. *See also Trane Company v. O'Connor Securities,* 718 F. 2d 26 at 28 (2d Cir. 1983) ("a growing number of courts have held that private civil RICO actions cannot be used to turn garden-variety Securities Law violations into racketeering violations under RICO").

Those courts that have embraced the "RICO-type injury" analysis have required a showing of either a "racketeering enterprise injury" or a "competitive injury." A racketeering enterprise injury occurs, for example, where "a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise. *Landmark Savings, supra,* 527 F. Supp. at 209. A competitive injury occurs where the plaintiff is forced to compete with an enterprise that has gained an unfair market advantage through the infusion of funds from racketeering activity. *North Barrington, supra,* 547 F. Supp. at 211. Both constructions find some support in the RICO statute itself. The statute was modelled in part after the antitrust legislation, *see Harper v. New Japan Securities Int'l, Inc.,* 545 F. Supp. 1002 (C.D. Cal., 1982); 113 Cong. Rec. 18,007

(1967), under which recovery has been similarly limited by the case law to instances of "antitrust injury."

For purposes of the question before me I need not determine which of these two constructions is more appropriate, since plaintiff's claim fails under either one. I find no allegation here of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud. To permit the RICO claim to stand under such circumstances would represent an unwarranted extension of the statute's coverage that is not supported by the case law.

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, those counts in plaintiff's complaint that allege violations of RICO are dismissed.

SO ORDERED.

SUPPLEMENTAL OPINION

GLASSER, United States District Judge:

The order of this Court dated November 14, 1983 dismissing plaintiff's RICO claims in the above captioned matter is hereby amended as follows:

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court determines that there is no just reason to delay the appeal from the dismissal of the RICO claims and directs that the dismissal be entered as a final judgment.

Should plaintiffs [sic] appeal this order they are directed to seek an expedited appeal. Trial of the remaining claims in the above-captioned suit shall be stayed pending the determination of the appeal. Counsel for the plaintiff is directed to advise the Court of the filing of an appeal and of the determination thereof.

SO ORDERED.

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §§1961-1968 (1978) (RICO)

§1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to

the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through

collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect,

interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any

interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the

essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(3) (3)

No. 84-648 and No. 84-657

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,
Petitioner,

- v. -

IMREX COMPANY, INC., et al.,
Respondents.

No. 84-657

BANKERS TRUST COMPANY,
Petitioner,

- v. -

DANIEL RHOADES, et al.,
Respondents.

BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

INTEREST OF AMICUS CURIAE

The City of New York ("City") submits this amicus curiae brief in support of the petitions for

writs of certiorari to the United States Court of Appeals for the Second Circuit.* The decisions of the Second Circuit in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), threaten the vitality and effectiveness of a statutory remedy used by the City and other local or state governments to combat systematic fraud and governmental corruption.

The New York City Charter charges the City with the responsibility of representing and protecting the public interest and the rights of its citizens. New York City Charter, Ch. 16, § 394. The City is also charged with the institutional responsibility of protecting its capability for delivering honest, efficient, impartial and effective governmental services to all its citizens. Id.

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*A third, recently-filed petition for a writ of certiorari to the Second Circuit, Joel, et al. v. Cirrito, et al., No. 84-604, raises some of the same issues as those herein. The City supports the issuance of a writ in that case for the same reasons stated herein.

In fulfilling its obligations, the City, as well as other localities, must confront the persistent challenges and dangers, as well as the corrupting influence posed by systematic criminal frauds. Tax evasion or public contractor frauds cause massive economic loss to the City. Bribery and kickback schemes injure the public fisc and impair the integrity of government. Public benefits programs are repeatedly targeted by malefactors who defraud the government and the intended beneficiaries. Organized drug trafficking and arson for profit schemes create extraordinary demands on police and other governmental services and diminish the quality of life in the City.

These criminal activities are often accomplished through sophisticated means, by criminal enterprises which systematically commit multiple criminal acts. Ordinary civil and criminal remedies available to penalize specific criminal acts and offer recompense to the City are insufficient to

eradicate the widespread problems caused by the systematic misconduct of criminal enterprises. Extraordinary remedies are needed to eradicate these widespread problems.

The City has found that the civil remedy provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") is an effective weapon for combatting these various criminal schemes and protecting the public interest, the public fisc and the institutions of local government.* Specifically, the City has employed the civil remedy provision in RICO to attack fraudulent tax evasion and illegal bidding

*The City's view is shared by commentators. See Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983); Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing The Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

schemes.* In City of New York v. Arnmart Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983) the City sued eleven beer distributors and their principal officers for

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*Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and far-reaching frauds, often accompanied by bribery or some other form of corruption. See New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y., filed December 21, 1983) (bribery and overcharges in connection with toxic waste disposal contract); County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981) (bribery and bid rigging in connection with sewer construction project); Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983) (taxpayers' civil RICO action arising from political slush fund payoffs, kickbacks, and money laundering scheme); Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir. 1984)(bribery and fraudulent billing by office supply company); Gerace v. Utica Veal Co., 580 F. Supp. 1465 (N.D.N.Y. 1984) (fraudulent underreporting by stockyard of weight and grade of ranchers' livestock, causing higher reimbursement payments to ranchers by state); County of Cook v. Lynch, 560 F. Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); Municipality of Anchorage v. Hitachi Cable, Ltd., 547 F. Supp. 633 (D. Alaska 1982) (bribery and bid rigging in connection with telephone cable contracts); Maryland v. Buzz Berg Wrecking Co., 496 F. Supp. 245 (D.Md. 1980) (bid rigging and bribery in connection with demolition work for urban renewal project).

their perpetration of an elaborate series of schemes — described in greater detail, infra — to evade the City's beer excise and general corporation taxes. In City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., filed November 16, 1981), the City sued the operators of a group of massage parlors who systematically laundered their revenues, committed bribery and evaded City taxes. In City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24, 1981) the City sued a fuel oil company and its principal officer for the damages flowing from a fraudulent bidding and overbilling scheme. In addition, the City has explored the possibility of a civil RICO action to recover the losses arising from extraordinary demands on local governmental services and diminution of the quality of life caused by the systematic misconduct of criminal enterprises.*

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*Compare City of Milwaukee v. Hansen, Civ. No. 77-246, slip op. at 3-4 (E.D.Wis. Jan. 13, 1981) (arsonists liable for treble the cost of fighting fires).

REASONS FOR GRANTING THE WRITS

The Second Circuit's decisions in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984) and Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984) destroy the efficacy of the civil remedy provision in RICO and consequently the ability of local and state governments to vindicate the public interest by means of that statute.

The prior conviction requirement created in Sedima, supra, 741 F.2d at 496-504 — which has absolutely no basis in the statute — makes local and state government civil RICO suits subject both to a prosecutor's prior exercise of discretion to commence a criminal action, and to the prosecutor's prior success in the criminal action. Thus, the prior conviction requirement strips local and state governments of independent use of an effective weapon against corruption, large-scale frauds and other broad-based criminal schemes.

The prior conviction requirement will bar many actions clearly contemplated by Congress when it enacted the civil remedy provision in RICO. For example, in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, eleven beer distributing companies evaded excise taxes on wholesale beer purchases in New York City by fraudulently representing sales of beer to be sales of soda; laundering beer sales through fictitious purchasers residing outside the City; engaging in off-the-books cash transactions; filing fraudulent tax returns; and failing to file tax returns. This is the kind of systematic criminal scheme which RICO was designed to eliminate. The City decided to bring a civil RICO treble damages action since treble damages would be most effective as a deterrent and as a means of recovering losses.*

*Referring a case to a criminal prosecutor does not guarantee that there will be a criminal prosecution, since the decision to do so is then within the prosecutor's discretion. Prosecutorial priorities may differ from the City's priorities, and prosecutorial resources are limited.

Because there were no prior convictions, the perpetrators of these schemes will totally escape civil liability under RICO - if the prior conviction requirement created in Sedima is not overruled.

The differing "racketeering injury" requirements in, respectively, Sedima and Bankers Trust, similarly eviscerate the utility of the civil remedy provision in RICO. The "mobster" requirement created in Sedima, supra, 741 F.2d at 494-96 is either so vague or so limited as to impose an insuperable obstacle to success in a civil RICO suit. It is contrary to the express intent of Congress, which feared that such a requirement would create an unconstitutional "status" offense. 116 Cong. Rec. 35,343 (1970). It is also contrary to the spirit, structure and language of the statute, which defined prohibited racketeering activity in terms of conduct rather than association. See 116 Cong. Rec. 35,344 (1970); see generally 18 U.S.C.

§§ 1961-1968. The "distinct RICO injury" requirement created in Bankers Trust, supra, 741 F.2d at 515-18, similarly debilitates the civil remedy provision in RICO, by illogically requiring a differentiation between the injury caused by any one predicate act and the injury caused by the RICO offense.

The Second Circuit's analysis in Bankers Trust of how the civil remedy provision in RICO would apply in a case of arson for profit demonstrates that the "distinct RICO injury" requirement deprives the civil remedy provision in RICO of any practical significance. In Bankers Trust, supra, 741 F.2d at 517, the Second Circuit stated that an example of a "distinct RICO injury" could be found where a victim of multiple arsons was denied fire insurance and thereafter was unable to obtain reimbursement for innocent fire damage (e.g., destruction caused by lightning). In contrast, the Second Circuit seemed to indicate that the

victim of repeated arsons could not sue the arsonist for fire damage directly resulting from fires set by the arsonist. Plainly, such analysis destroys the effectiveness of the civil remedy provision in RICO as a method for combatting crime, and erodes the doctrine established in City of Milwaukee v. Hansen, supra, that the damage directly resulting from arson - in that case, municipal fire-fighting costs - is compensable in a civil RICO suit. Plainly, such analysis undermines the purposes of the civil remedy provision in RICO — augmented compensation to the victim for all of its losses resulting from the criminal scheme, and the economic destruction of the criminal enterprise.

CONCLUSION

For the reasons set forth herein, amicus curiae, The City of New York respectfully urges that the Court grant the petitions for writs of certiorari to review the decisions of the Second Circuit Court of Appeals.

November 21, 1984.

Respectfully submitted,

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Corporation Counsel of the
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Office-Supreme Court, U.S.
FILED
NOV 26 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-648

In The Supreme Court of the United States

October Term, 1984

SEDIMA S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY INC., JACOB ARMON and GIDON ARMON,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 84-648
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SEDIMA S.P.R.L.,
Petitioner,

vs.

IMREX COMPANY INC., JACOB ARMON and GIDON ARMON,
Respondents.

Brief in Opposition to the Petition For a Writ of Certiorari

STATEMENT

Respondents Imrex Company, Inc., Jacob Armon and Gidon Armon, respectfully submit that the Petition for a Writ for Certiorari herein should be denied.

No additional statement of facts other than those described in the petition and the opinion below are necessary for the Court's consideration of the Petition at this time.

REASONS FOR DENYING THE WRIT

POINT I

The Court Below Properly Held That "RICO-Type Injury" Must be Alleged.

The Second Circuit's decisions in the instant case and its companion cases have been the subject of

much popular commentary and, in recent months, have been analyzed by and referred to in decisions of at lease two other Circuit Courts of Appeal.* A careful review of the Second Circuit cases shows that they represent perhaps the most comprehensive statement of the legislative history and intent of 18 USC 1961 et. seq. ("Civil RICO"), and the most reasoned analysis of the scope of the act which has ever been made in the Federal Courts.

The most significant criticisms made by petitioner herein may be summarized as follows:

1. The imposition of a "RICO type injury" requirement is merely a retreat to the now-discredited requirement that a connection must be alleged between the defendants in the civil RICO suit and "organized crime."

2. The requirement of a prior criminal conviction of predicate acts has no basis in a reading of the statute, and never was intended by the Congress.

3. The Court's opinion below represents an unwarranted exercise in "judicial activism," which goes clearly beyond the expressed intent of the scope of the statute.

We shall consider each of these important criticisms *seriatim.*

**Alexander Grant and Company v. Tiffany Industries, Inc.*, No. 83-1608 (8th Cir. Aug. 2, 1984).

Haroco, Inc. v. American National Bank and Trust Company of Chicago, et al., No. 83-2529 (7th Cir. Oct. 19, 1984).

First and foremost is the requirement that a plaintiff under civil RICO plead and prove a "RICO-type injury." *Stripped to its essentials, this standard requires pleading of injury to the purported victim beyond that which results directly from the individual predicate acts as defined in 18 USC 1961.* In this regard, it can be said that both *SEDIMA* and *Bankers Trust Co. v. Rhoades*, __ F.2d __, imposed precisely the same rule.

We need not restate the lengthy citations of cases both in the District Courts and the Circuit Courts of Appeal which have found themselves on either side of this issue.*

A detailed review of the decisions reveals that the courts which do not require the pleading and proof of a "RICO-type injury" beyond that of the individual predicate acts themselves, have resorted to a purely mechanistic reading of the statute. The result is the "extraordinary, if not outrageous"* application of the statute to all varieties of disputes. The necessary "enterprise" itself is more often than not a legitimate business entity. The "pattern of racketeering" is merely the alleged commission of one or more predicate offenses in the course of operation of the "enterprise." Nearly every "garden variety" commercial fraud, bankruptcy fraud, securities fraud or common-law conversion or breach of contract action can, by virtue of this expansive reading, be converted

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*A review of these cases appears in the opinion below at pages 20a and 21a. Page numbers used herein refer to the Appendix to the Petition.

*Opinion below at page 9a.

into a Civil RICO action. Most troublesome of all are the predicate acts which were alleged to sustain the RICO claims in the instant action—the allegations of acts of wire fraud and/or mail fraud. The federal courts have read these criminal statutes so broadly that they now permit, if not demand, that almost every commercial dispute be converted into a RICO claim.

The clear import of the imposition of a "RICO-type injury" standing requirement is to require *at least the allegations of injury which the RICO law was intended to prevent.* There can be no doubt that the federal courts have wrestled with this concept, and some, finding a "RICO-type injury" hard to define, have given up the fight and retreated to the mechanistic analysis referred to, *supra.*

The chief criticisms of the "RICO-type injury" standing requirement are, first, that it imposes restrictions drawn from the courts' experience with the Clayton Act, 15 USC Sec. 15(a), without express language in the statute to that effect, and second, that it creates a distinction between so-called "direct" and "indirect" injury which negates the intent of the statute. Each of these criticisms is inappropriate and incorrect.

The Court below, in its extensive opinion, detailed at great length the interrelation between the genesis of civil RICO and the consideration of its relationship with the then-existing antitrust laws. The Court, in the instant case, has held that Clayton-Act type standing requirements are appropriately imposed under RICO, given the fact that Civil RICO was clearly "modeled after" the then-existing Clayton Act provi-

sions. The Court below correctly referred to the case of *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 US 477 (1977) in determining that there must be the existence of a "RICO-type injury" as a predicate for the commencement of the Civil RICO action.

Petitioner claims that the requirement of a "RICO-type injury" is effectively the same as a reimposition of the requirement that a connection with organized crime be alleged by plaintiffs. The issue of whether or not the phrase "organized crime" should be utilized in judicial analysis of RICO should be put to rest once and for all. It is clearly the consensus of the Circuit Courts that a private RICO plaintiff need not plead or prove that the defendants in a civil RICO action are connected with, or are members of, "organized crime."*

Many courts have commented on the specific reasons why the terms "organized crime," "Mafia," or "Cosa Nostra" were not included in the statutory language of RICO. This was because the Supreme Court had declared as constitutionally improper the imposition of "status offenses." See *Robinson v. California*, 370 U.S. 660 (1962). While the phrase "organized crime" may have some usefulness for the public press, in legislative debate, and even perhaps for the every-day actions of law enforcement agencies, we submit that it simply has no place in determining the intent or scope of Civil RICO. Why then has the claim been made that an "organized-crime connection" is now born again as the requirement of "RICO-type injury?" Simply because, in the use of

*See citations in petition at page 18.

strong language, the Court below referred once in its lengthy opinion to "mobsters."* Not only does petitioner claim that the Court below has now imposed a requirement that the defendants be "mobsters." A similar comment may be found in the Court's analysis in *Haroco v. American National Bank and Trust Company, supra*, at pg. 20 of that opinion. We submit that the Court below did not hold that there must be a pleading or proof or connection between the defendants and "mobsters." There simply must be a pleading and proof of "RICO-type injury" as discussed in detail in the opinion.

What then is proper "RICO-type injury?" The instant case, for the first time among the circuits, accepted and synthesized two theoretical strands which have appeared in numerous District Court cases around the country. The first is the notion of a "racketeering enterprise injury," which the District Court defined as an injury which occurs where the "defendants ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise." District Court Opinion at pg. 62a. The second is a requirement of "competitive injury," defined by the Court below as an "injury to business or property stemming from competitive harm." Opinion at pg. 5a.

Some Courts, based upon part of the analysis in *Schacht v. Brown*, 711 F2d 1343 (7th Cir. 1983) have been confused that the imposition of a "RICO-type injury" requires a distinction between "direct" and "indirect" injury. We respectfully suggest that the

*At opinion pg. 27a.

direct/indirect injury analysis is erroneous, and undermines a proper analysis of Civil RICO. Horror stories abound in the opinions of the Circuit Courts (compare *Haroco* and *Alexander Grant, supra*) suggesting that in certain circumstances, the imposition of a "RICO-type injury" requirement would lead to a circumstance where the proper "victim" could not sue under civil RICO, but where a competing criminal entity or enterprise could do so.

Respondent submits that the imposition of a requirement of a "RICO-type injury," synthesized in the instant case as *either* a racketeering enterprise injury or a competitive injury, is indeed an appropriate holding.* It attempts to *properly* describe the conduct which Civil RICO seeks to deter and punish, without becoming sidetracked into an analysis of the phrase "organized crime," or the ambiguities of a "direct/indirect injury" analysis.

*The implications that the Supreme Court has given specific guidance on the scope and use of civil RICO are incorrect. Neither *United States v. Turkette*, 452 US 576 (1981) nor *Russello v. United States*, __U.S.__, 104 S.Ct. 296 (1983) give guidance in this area. Notwithstanding the fact that *Russello* emphatically restates the Supreme Court's opinion that criminal RICO should be construed broadly to effectuate its purpose, that case dealt with defining the parameters of the civil forfeiture procedures pursuant to a criminal prosecution.

Furthermore, regarding *Turkette*, the Court below held (Opinion at page 22a): "the Court was only discussing congressional intention as to the criminal enforcement provisions of RICO, not the intended scope of the private civil remedy."

POINT II

The Court Below Properly Held That Prior Convictions of Predicate Acts Are Required.

Petitioner claims that "Congress' failure to use the term conviction in Civil RICO manifests an intent not to require previous convictions of predicate acts or of RICO itself."* We must concede that the issue of whether or not conviction of a predicate act is required before the commencement of a suit under Civil RICO, was neither briefed nor argued before the District Court or the Court of Appeals below. However, the Court, even at the time of oral argument, was exceedingly mindful of the unanswered issues concerning the burden of proof and the interrelationship between a Civil RICO prosecution and constitutional rights of defendants under Civil RICO.

What is it that was so disturbing to the Court below that they imposed a requirement which has not previously been discussed at length in any decision of the other Circuit Courts of Appeals? The Court was clearly concerned about issues of burden of proof, having knowledge of the fact that although there has been an explosion of "RICO-type" litigation, there are but a handfull of reported cases of appeals from judgments under RICO cases which have in fact gone to verdict. The Court posed the question in this way:

> "Is one to be held liable under a lesser standard of proof in a private right of civil action and not incidentally, thereby stigmatized as a racketeer? It is hard to believe that in adopting Civil RICO, Congress intended to permit proof of "wilfull" violations by only a

*Petition at pg. 10.

> preponderance of the evidence. Otherwise, two misstatements in a proxy solicitation could subject any director in any national corporation to racketeering charges and the threat of treble damages and attorney's fees." Opinion at pg. 35a.

The Court, in a thorough analysis of precedent regarding the issue of prior criminal conviction, noted clearly that the fountainhead for the other Courts' rejection of this requirement is the case of *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1975) Cert. den. 420 U.S. 925 (1975). The Court in the instant action correctly concluded that *Cappetto* dealt only with the imposition of Civil equitable relief on behalf of the government. "Thus, far from determining the question of the intended or appropriate scope of the treble damage remedy provided to private parties under Subsection 1964(c), *Cappetto* made no holding with respect to private civil actions." Opinion at pg. 29a. The Court properly noted that "almost all of the cases that hold that criminal convictions are not necessary rely either on *Farmers Bank*, or *Cappetto* and offer no other reasoning to support their conclusions." Opinion at pg. 30a. The Court viewed the principal inherent danger in not requiring prior convictions in the distinction between the burden of proof of the principal case (preponderance of the evidence) and the requisite burden of proof to show the criminal activity—the predicate acts—themselves. In this regard, the Court emphasized that "Reading private civil RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorneys fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law. Thus, the

construction advanced in this opinion avoids serious constitutional questions." Opinion at n. 49, pg. 36a.

In support of this position, the Court referred to commentary which clearly shows that "The act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal" and concluded that "RICO liability simply does not exist without criminal conduct . . . in a civil context, there is no way to know whether the conduct in question is already criminal, a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions." Opinion at pgs. 37a-38a.

Thus, the Court concluded that "the most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward,—that a criminal conviction must proceed a private civil suit." Opinion at pg. 40a.

Petitioner views the holding requiring prior criminal conviction as a "preposterous" proposition. (See petition at page 13). We respectfully disagree. The basic elements of the court's analysis can easily be summarized. First, it determined that the language of the statute was ambiguous. Then, after careful review, the majority determined that much, if not all of the previously used legislative history related to comments regarding criminal sanctions, made before the civil remedy emerged from the House of Representatives for inclusion in the final version of the new statute. Next the Court reviewed the overall intent of the statute and found that it was to further punish already-defined and proven criminal activity. Contrary to twisting statutory construction "into a gordian knot," (Petition at Page 13), this reasoned analysis makes the most of a statute with ambiguous drafting but with admirable basic purposes which should be effectuated by the federal courts if at all possible.

POINT III

The Court Below Did Not Exceed Its Authority In Its Ruling.

The claim is made that those who seek the broadest interpretation of the statute are assisting in the fight whereby private interests can vindicate the victims of certain criminal activity. Indeed, petitioner herein has included statistical data suggesting the magnitude of the loss to the nation's economy resulting from a variety of so-called "organized" or "white-collar" offenses. This is a simplistic argument and one which is not worthy of the litigants in this case or the related cases. In the first instance, what is being discussed is the role of *Civil RICO.* There is no inference from anything to be determined here that the Federal Government should have less than an activist role in the criminal prosecution of organized crime, including the use of RICO's criminal sanctions, and the injunctive relief and forfeiture provisions available to the federal government.* One suspects that the motive in urging a broad interpretation of Civil RICO is not so much to win vindication for true victims of organized criminal behavior but rather to

*As the Court stated in its opinion below (at page 8a):

"There is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow."

expand a potent weapon in what has always been and clearly remains the area of ordinary commercial disputes.

The opinion below properly pointed out that there was a significant prior relationship between the parties in the instant case. In fact, aside from a long-standing business relationship between the owners of the corporate parties, Sedima and Imrex had sold millions of dollars of aerospace components as joint-venturers prior to the time petitioner claimed improprieties in the billings.

The legislative record, early opinions and several commentators have been specifically concerned about the "infiltration" of "legitimate" enterprises by the persons and organizations who should be the target of Civil RICO. We suggest that a dispute as to billing practices between partners was not what the drafters had in mind when they discussed "infiltration" of business by criminal elements.

The Court below clearly chose to act on several concerns expressed by the other circuit Courts of Appeal. However, contrary to the actions of the other circuits, which determined that repair and correction of RICO must be left to the Congress, the Second Circuit determined that the structure of the act can be read *only* if it requires "RICO-type injury" and prior convictions of predicate acts. The claim is made that the Court thereby conducted an "aggressive jurisprudence" which improperly restrained the scope of RICO, which so many Courts and commentators have suggested must be interpreted in a "liberal fashion." We respectfully submit that petitioner is incorrect. It is paradoxical that an attempt to strictly

construe the scope of an important Federal statute has now been labeled "improper aggressive jurisprudence."

We respectfully suggest that those courts and commentators who have permitted a mechanistic reading of the statute, whereby the mere allegation of predicate acts has become enough to bring to bear all the effects of RICO, are those who have conducted an "unnecessarily aggressive" jurisprudence. As the Court stated in its opinion below, there is a "clanging silence" regarding the legislative intent of Civil RICO.* The Court below ably demonstrated what others have not, that the various legislative debates which have been recited by commentators and other courts pertain *strictly* to the Senate's version of the bill and therefore, do not address the issues of Civil RICO which separately arose in the House and on which there is a tremendous paucity of legislative record.

The after-the-fact transference of legislative history from the subject of prosecutorial techniques to private civil remedies would indeed constitute an

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*"The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible indications of [s]ection 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades, statutes, regulations, commentaries, and jurisprudence—it would at least have mentioned it. The House judiciary committee, which offered the provision, would at least have mentioned the amendment to the House as a major change in its report had there been any inkling of its possible implications."

"aggressive jurisprudence." *That* is the liberalization of the law, not the decisions which have sought to properly restrict the law by reading carefully the failure of legislative history, by judging the important relevance of the laws genesis from the anti-trust laws, and by considering the serious constitutional questions involved in permitting the unfettered operation of an enormously powerful civil litigation weapon.

We respectfully suggest that the majority below properly stated the rationale for strict interpretation of the statute, at page 43a of its opinion: "Before we impute to Congress the intention of federalizing a large portion of the common law, which since the time of the Constitution, has been left to the courts of the several states, and of providing treble damages and attorneys fees for violating these laws, or of altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils, we will require more explicit language from Congress indicative of such intent."

CONCLUSION

We are mindful of the split between the circuits in the instant matters. However, we respectfully suggest to this Court that the decision below represents the most comprehensive analysis of, and the most complete definition of the operation and intent of Civil RICO, and we respectfully submit that the petition should in all respects be denied.

Respectfully submitted,

RICHARD EISENBERG
ALFRED WEINTRAUB
Attorneys for Respondents

Statement Pursuant to Rule 28 Of the Supreme Court

Respondent Imrex Company, Inc. does not have a parent company. Imrex Sales Corp. is an affiliate. Imrex Company, Inc. has no subsidiary companies other than wholly-owned subsidiaries.

No. 84-648 (4)

Office - Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX CO., INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Petition for *Certiorari* Filed October 19, 1984
***Certiorari* Granted January 14, 1985**

3 vols

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 83 Civ. 2161 (ILG)

7/23/82	Complaint filed. Summons issued. em(1)
9/8/82	By SIFTONJ-Stip dtd 8-19-82 extending defts time to answer to 9-10-82 filed. mg(3)
10/7/82	Plaintiff's Reply, filed. gp(4)
5/31/83	Plaintiff's Notice of Motion returnable 06.17.83 at 9:30 A.M. for an order granting plaintiff's motion for leave to amend complaint, etc., filed together with Affidavit of Franklyn H. Snitow. gp(19)
5/31/83	Sedima's Memorandum of Points and authorities in support its motion to amend its complaint and add a party defendant, etc., filed. gp(20)
6/16/83	By Glasser, J. — Stipulation and Order that plaintiff's amended complaint is deemed served and amended on 06-17-83, filed. gp(21)
7/21/83	Deft's Notice of Motion ret. 9/16/83 at 9:30 AM, for an Order pursuant to FRCP 12(b), dismissing so much of the Amended Complaint herein as purports to state a claim under 18 USC 1961, *et seq*, filed. EC(23)

Relevant Docket Entries

7/21/83	Deft's Memorandum of Law in Support of Motion to Dismiss the Amended Complaint, filed. EC(24)
9/9/83	Plaintiff's Amended Complaint, filed. EC(28)
9/13/83	Affidavit of Franklyn H. Snitow in Opposition to the defendants' motion to dismiss the Ninth Count of the Amended Complaint, filed. gp(30)
9/13/83	Plaintiff's Memorandum of points and authorities in opposition to defendants' motion to dismiss, filed. gp(31)
9/14/83	Plaintiff's Memorandum of Points and Authorities in Opposition to Defts' Motion to Dismiss, filed. EC(32)
10/13/83	Defts' Reply Memorandum of Law, filed. EC(35)
10/4/83	Before Glasser, J. — Case Called. Counsel for all sides present. Motion for an order dismissing amended complaint argued. Decision reserved. Deft. requests adjdment of trial date of 01/09/84. Application denied. gp(--)
10/27/83	Stenographer's transcript dtd 10/14/83 at 9:30 AM, filed. EC(37)
11/16/83	By Glasser, J., Memo & Order dtd 11/14/83, that pursuant to Rule 12(b)(6) FRCP, those counts in plaintiff's complaint that allege violations of

Relevant Docket Entries

	RICO are dismissed, filed. See M&O for details. Copies mailed.. EC(46)
11/22/83	Letter dated 11/18/83 to Judge Glasser from William H. Pauley, III in re: requesting that certification should be granted, etc., filed. gp(49)
11/22/83	By Glasser, J. — Memorandum and Order dated 11/18/83 that dismissal be entered as a final judgment, filed. Parties informed. gp(50)
11/23/83	*** NOTICE OF APPEAL (pltff-appellant) from orders entered 11/16 & 11/22/83, filed with receipt #53804 for C of A docketing fee. C of A notified. Certificate of service attached. vw
12/2/83	Clerk's Judgment dtd 12/1/83, that pursuant to Rule 54(b) FRCP there being no just reason to delay the appeal from the Order dtd 11/14/83 dismissing plaintiff's RICO claims, the dismissal is entered as final judgment. Copies mailed. EC

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 83-7965

7/25/84	Judgment affirmed by published signed opinion (JLO)
7/25/84	Cardamone, CJ, dissenting in separate opinion filed.

Relevant Docket Entries

7/25/84	Judgment filed.
8/7/84	Appellees Imrex Co. et al itemized and verified bill of costs W/pfs recd.
8/14/84	Appellees statement of costs filed.
8/15/84	Mandate (Opinion, judgment & statement of costs) issued.
10/22/84	Notice of filing of petition for writ of certiorari filed (SC#84-648)
1/14/85	Certified copy of order granting the petition for a writ of Certiorari filed.
2/25/85	Original proceedings and District Court record transmitted to the Supreme Court.

NOTICE OF MOTION FOR ORDER TO DISMISS THE AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

82 Civ. 2161 (ILG)

SEDIMA, S.P.R.L.,

Plaintiff

- against -

IMREX COMPANY, INC., GIDON ARMON and JACK ARMON,

Defendants.

PLEASE TAKE NOTICE, that defendants will move this Court, before the Hon. I. LEO GLASSER, at the Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 22nd day of July, 1983, at 9:30 in the forenoon or as soon thereafter as counsel can be heard, for an Order, pursuant to FRCP 12(b), dismissing so much of the Amended Complaint herein as purports to state a claim under 18 USC §1961 *et. seq.*

Dated: Garden City, New York
July 7, 1983

Yours, etc.

SHAW, GOLDMAN, LICITRA,
LEVINE & WEINBERG, P.C.
Attorneys for Defendants

Notice of Motion

BY: Richard Eisenberg
A Member of the Firm
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Garden City, New York 11530

TO:

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Attorneys for Plaintiff
750 Third Avenue
New York, New York

AMENDED COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

82 CIV. 2161 (ILG)

SEDIMA S.P.R.L.,

Plaintiff,

against

IMREX COMPANY, INC., GIDON ARMON, and JACOB ARMON,

Defendants.

JURY TRIAL DEMANDED

Plaintiff, SEDIMA S.P.R.L., by its attorneys, Orenstein Snitow & Sutak, P.C., for its Amended Complaint herein alleges:

JURISDICTION

1. At all times herein, plaintiff SEDIMA S.P.R.L. ("SEDIMA"), was and still is a corporation organized under the laws of Belgium, having its principal place of business at Avenue Eugene Ysaye 33, Brussels, Belgium.

2. Upon information and belief, at all times herein, defendant IMREX COMPANY, INC. ("IMREX"), was and still is a corporation organized under the laws of the State of New York, having its principal place of business in the County of Nassau, State of New York.

3. Upon information and belief, at all times herein, defendant GIDON ARMON was and still is a resident of the County of Nassau, State of New York.

4. Upon information and belief, at all times herein, defendant JACOB ARMON was and still is a resident of the County of Nassau, State of New York.

5. The amount in controversy in this matter exceeds the sum of TEN THOUSAND DOLLARS ($10,000.00), exclusive of interest and costs.

6. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §1332 (diversity jurisdiction) and 28 U.S.C. §1331(a) and 18 U.S.C. §1961 *et seq.* (federal question jurisdiction).

7. Venue is proper in this District pursuant to 28 U.S.C. §1391(a).

FIRST COUNT AGAINST IMREX

8. SEDIMA is engaged in the business of importing and exporting electronic, mechanical and hydraulic components manufactured in the United States.

9. Upon information and belief, IMREX is engaged in the business of exporting aircraft and aircraft-related electronic component parts.

10. Upon information and belief, during the period described herein, JACOB ARMON was an officer and employee of IMREX.

11. Upon information and belief, during the period described herein, GIDON ARMON was an officer and employee of IMREX.

12. In or about June 1979, SEDIMA and IMREX entered into an agreement of joint adventure (the "joint adventure") wherein SEDIMA and IMREX agreed that SEDIMA, on behalf of the joint adventure, would secure certain orders for electronic component parts from Ataliers de Constructions Electriques Charleroi ("A.C.E.C."), a businss enterprise in Belgium, under A.C.E.C.'s "Belhip" and "P.I.P." programs.

13. It was further agreed by SEDIMA and IMREX, as part of said agreement of joint adventure, that IMREX would obtain the electronic component parts in the United States and cause them to be shipped to Europe pursuant to orders secured by SEDIMA.

14. Under the terms of the joint adventure, SEDIMA and IMREX agreed to equally divide all monies realized from the sale of said electronic component parts less the purchase prices, attendant costs, and shipping and financing charges of the electronic component parts.

15. SEDIMA and IMREX agreed to contribute their respective property, financial resources, efforts, skill and knowledge towards securing the objectives of the joint adventure.

16. SEDIMA and IMREX agreed to equally share any profits, costs and/or losses which would result from carrying out the terms of the joint adventure.

17. From about June 1979 through about August 1982, pursuant to the agreement of joint adventure, SEDIMA caused orders in the amount of approximately EIGHT MILLION FIVE HUNDRED THOUSAND ($8,500,000) DOLLARS to be placed through IMREX.

18. IMREX, JACOB ARMON and GIDON ARMON, pursuant to the agreement of joint adventure, from time to time represented to SEDIMA, in writing and/or orally, the purchase prices, attendant costs, and shipping and financing charges of the electronic component parts purchased or to be purchased.

19. IMREX, JACOB ARMON and GIDON ARMON fraudulently prepared or caused to be prepared purchase orders, invoices, and credit memoranda for SEDIMA that they knew falsely overstated the purchase prices, attendant costs, and shipping and financing charges of the electronic component parts purchased or to be purchased on behalf of the joint adventure.

20. In reliance upon such representations and pursuant to the terms of the agreement of joint adventure, from about June 1979 through about August 1982, IMREX received monies belonging to the joint adventure for the purposes of paying for, or compensating IMREX for the alleged previous payment of the claimed purchase price of the electronic component parts.

21. In reliance upon said representations and pursuant to the terms of the agreement of joint adventure from about June 1979 to about August 1982, IMREX has received monies belonging to the joint adventure for the purposes of paying for, or compensating IMREX for the alleged previous payment of the claimed attendant costs, and shipping and financing charges of the electronic component parts.

22. In violation of its fiduciary and contractual obligations to SEDIMA as co-adventurer, IMREX knowingly and willfully misrepresented the purchase prices, attendant costs, and shipping and finance charges of said electronic component parts in that:

(a) IMREX, JACOB ARMON and GIDON ARMON caused the following credit memoranda to be issued to SEDIMA which intentionally misrepresented the amount of profit to which SEDIMA was entitled.:

DATE	CREDIT MEMO #	MISSTATED AMOUNT OF PROFIT
August 11, 1980	664	$30,464.30
September 19, 1980	674	42,875.70
October 17, 1980	681	26,406.40
December 11, 1980	701	19,534.05
April 7, 1981	736	18,058.00
April 27, 1981	751	8,772.99
May 29, 1981	757	14,265.35

These intentional misrepresentations by IMREX, JACOB ARMON and GIDON ARMON damaged SEDIMA in the amount of at least TWENTY FIVE THOUSAND FOUR HUNDRED SEVENTY-ONE and 67/100 ($25,471.67) DOLLARS.

(b) On numerous occasions during the course of the joint adventure, IMREX, JACOB ARMON and GIDON ARMON caused fraudulent purchase orders to be published and sent to SEDIMA which overstated the cost of the electronic component parts that were purchased on behalf of the joint adventure by a sum not yet determined but believed to exceed TWO HUNDRED FIFTY THOUSAND ($250,000) DOLLARS.

(c) On numerous occasions, IMREX, JACOB ARMON and GIDON ARMON caused fraudulent purchase orders and invoices to be sent to SEDIMA that falsely set forth the costs attendant to the purchase of electronic component parts on behalf of the joint adventure, including but not limited to the lot test

charges, the "S.U.C." charges and the "PMS" charges in an amount as yet undetermined, but believed to exceed TEN THOUSAND ($10,000) DOLLARS.

(d) On numerous occasions, IMREX, JACOB ARMON and GIDON ARMON caused fraudulent purchase orders to be published and sent to SEDIMA that falsely set forth the terms of payment required by the vendor or manufacturer, thereby unjustly enriching IMREX and damaging SEDIMA in an amount as yet undetermined.

(e) IMREX, JACOB ARMON and GIDON ARMON knowingly misrepresented the amount of pre-shipment interest to be charged SEDIMA and further knowingly failed to credit SEDIMA for interest received on monies paid to IMREX, and thereby damaged SEDIMA in an amount as yet undetermined, but not less than TWELVE THOUSAND FIVE HUNDRED ($12,500) DOLLARS.

(f) As a result of IMREX's, GIDON ARMON's and JACOB ARMON's fraudulent misrepresentations and overstatements, as described herein, IMREX, GIDON ARMON and JACOB ARMON also fraudulently caused the publication and delivery of fraudulent credit memoranda to SEDIMA which overstated the "cost of material" by an amount undetermined but believed to exceed TWO HUNDRED SEVENTY THOUSAND ($270,000) DOLLARS.

(g) IMREX, JACOB ARMON and GIDON ARMON engaged in a systematic and regular course of conduct in publishing and sending false and fraudulent purchase orders, invoices and credit memoranda to SEDIMA, whereby IMREX and JACOB ARMON and GIDON ARMON wilfully and knowingly overstated

and misrepresented the purchase prices, attendant costs, and shipping and financing charges of the electronic component parts.

23. By reason of IMREX's breach of its agreement of joint adventure, SEDIMA has been damaged in an amount as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

SECOND COUNT AGAINST IMREX

24. SEDIMA repeats and realleges each and every allegation contained in paragraphs "1" through "22" as if set forth in full here.

25. By reason of the agreement of joint adventure entered into by SEDIMA and IMREX, IMREX owed a fiduciary obligation to SEDIMA as co-adventurer.

26. By reason of the fiduciary obligation which IMREX owed to SEDIMA, IMREX was and is obligated to fully, frankly and truthfully account to SEDIMA for all transactions on behalf of the joint adventure, including but not limited to, the purchase prices, attendant costs, and shipping and financing charges of the electronic component parts as well as for all profits and losses of the joint adventure.

27. IMREX has never truthfully accounted for the money that it wrongfully received and retained under said agreement, nor has IMREX paid over to SEDIMA the monies that it owes SEDIMA under the agreement.

28. SEDIMA has duly performed all of the terms and conditions of its agreement of joint adventure with IMREX.

29. SEDIMA has been greatly injured by IMREX's breach of its fiduciary duties and SEDIMA has no adequate remedy at law.

30. As a result of IMREX's breach of its fiduciary obligations to SEDIMA, IMREX has wrongfully collected and retained large sums of money, the total amount of which is as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

THIRD COUNT AGAINST IMREX, JACOB ARMON AND GIDON ARMON

31. SEDIMA repeats and realleges each and every allegation set forth in paragraphs '1" through '22" and paragraphs "25" through "29" as if set forth in full here.

32. From about June 1979 to about August 1982, IMREX, JACOB ARMON and GIDON ARMON, pursuant to the terms of the agreement of joint adventure, sent and/or caused to be sent to SEDIMA copies of purchase orders, invoices, and credit memoranda purportedly reflecting the purchase prices, attendant costs, and shipping and financing charges of electronic component parts purchased and to be purchased by and on behalf of the joint adventure.

33. From about June 1979 to about August 1982, IMREX, JACOB ARMON and GIDON ARMON prepared and/or caused to be prepared false and fraudulent purchase orders, invoices and credit memoranda by overstating the purchase prices, and/or attendant costs, and/or shipping and finance charges of the electronic component parts, as well as misrepresenting the terms of payment.

34. Those misrepresentations were made by IMREX, JACOB ARMON and GIDON ARMON for the purpose and with the intent of deceiving and defrauding SEDIMA and of inducing SEDIMA, in reliance thereon, to transfer moneys to IMREX to which IMREX was not lawfully entitled under the agreement of joint adventure.

35. SEDIMA relied on the misrepresentations made by IMREX, JACOB ARMON and GIDON ARMON and thereby transferred and allowed IMREX to retain moneys to which IMREX was not entitled under the agreement of joint adventure.

36. By their conduct, IMREX, JACOB ARMON and GIDON ARMON defrauded and deceived SEDIMA and caused SEDIMA to transfer monies to IMREX, thereby allowing IMREX to be unjustly enriched at the expense of SEDIMA.

37. By reason of the foregoing, SEDIMA has been damaged in the sum of at least ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

FOURTH COUNT AGAINST IMREX

38. SEDIMA repeats and realleges each and every allegation contained in paragraphs "1" through "22", "25" through "29" and "32" through "36" as if set forth in full here.

39. IMREX has never rendered to SEDIMA a true and correct account of the state of the business and of the pro- fits which should have been realized by the joint adventure.

40. SEDIMA can show that it was entitled to receive more than it received from IMREX by at least the sum of ONE

HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

41. By reason of the foregoing, the parties cannot be restored to their respective positions.

42. As a result of the fraud and/or material breaches of the agreement of joint adventure committed against SEDIMA by IMREX, JACOB ARMON and GIDON ARMON, SEDIMA is entitled to rescind the agreement of joint adventure and to sue in quasi-contract for quantum meruit.

43. As a result of the fraud and material breaches of the contract of joint adventure by IMREX, IMREX has been unjustly enriched at SEDIMA's expense in an amount as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

44. Accordingly, IMREX is liable to SEDIMA in quasi-contract in an amount, as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

FIFTH COUNT AGAINST IMREX

45. SEDIMA repeats and realleges each and every allegation set forth in paragraphs "1" through "22", "25" through "29" and "32" through "36" as if set forth in full here.

46. By reason of the agreement of joint adventure and even based upon the financial information that IMREX, JACOB ARMON and GIDON ARMON supplied to SEDIMA in 1981, IMREX owes SEDIMA THIRTY FIVE THOUSAND ($35,000.00) DOLLARS.

47. SEDIMA has duly demanded payment of the THIRTY FIVE THOUSAND ($35,000.00) DOLLARS but IMREX has refused to make any payment to SEDIMA.

48. By reason of the foregoing, IMREX is liable to SEDIMA for breaching its agreement of joint adventure in the amount of THIRTY FIVE THOUSAND ($35,000.00) DOLLARS.

SIXTH COUNT AGAINST IMREX

50. SEDIMA repeats and realleges each and every allegation set forth in paragraphs "1" through "22", "25" through "29", and "32" through "36" as if set forth in full here.

50. By reason of the foregoing, IMREX has unlawfully converted to its own use an amount, as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

SEVENTH COUNT AGAINST IMREX

51. SEDIMA repeats and realleges each and every allegation set forth in paragraphs "1" through "22", "25" through "29", and "32" through "36" as if set forth in full here.

52. By reason of the foreging, IMREX is liable to SEDIMA for money had and received in an amount, as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

EIGHTH COUNT AGAINST IMREX

53. SEDIMA repeats and realleges each and every allegation set forth in paragraphs "1" through "22", "25" through "29", and "32" through "36" as if set forth in full here.

54. By reason of the foregoing, IMREX holds an amount, as yet to be determined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS as constructive trustee and bailee for SEDIMA.

NINTH COUNT AGAINST IMREX, JACOB ARMON AND GIDON ARMON

55. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through "22", "25" through "29", and "32" through "36", as if set forth in full here.

56. IMREX, JACOB ARMON and GIDON ARMON, in violation of the Racketeer Influenced and Corrupt Organizations ("RICO") statute (18 U.S.C. §1962(c)), while associated with and/or employed by an enterprise engaged in and/or the activities of which affected interstate and foreign commerce, conducted and participated in the conduct of such enterprise's affairs through a pattern of racketeering activity.

57. Plaintiff has been injured in its business by reason of the aforesaid violation of the RICO statute and may recover treble damages and the cost of this suit, including reasonable attorney's fees, as a result thereof, pursuant to 18 U.S.C. §1964(c).

58. The joint adventure was, at all times herein, an enterprise engaged in, and the activities of which affected, interstate and foreign commerce.

59. IMREX, JACOB ARMON and GIDON ARMON at all times herein, were associated with the joint adventure, in that they substantially participated in the operation of the joint adventure. Said participation consisted of the procurement and shipping of electronic component parts on behalf of the joint adventure and the transmittal of purchase orders, invoices, and credit memoranda relating thereto to SEDIMA, as co-adventurer.

60. IMREX, JACOB ARMON and GIDON ARMON at all times herein, directly and indirectly conducted and participated in the conduct of the joint adventure through a pattern of racketeering in violation of 18 U.S.C. §1962(c).

61. From about June 1979 to about August 1982, pursuant to the agreement of joint adventure, SEDIMA caused orders for electronic component parts in the amount of EIGHT MILLION ($8,000,000) DOLLARS to be placed through IMREX.

62. Pursuant to the joint adventure, IMREX agreed to furnish SEDIMA with copies of the purchase orders sent by IMREX to the vendor or manufacturer of the electronic component parts.

63. Said purchase orders were to be furnished to SEDIMA for the purpose of advising SEDIMA of the terms of purchase of the electronic component parts.

64. Upon information and belief, IMREX, JACOB ARMON and GIDON ARMON, and other employees of IMREX caused purchase orders to be sent to manufacturers and/or vendors of electronic component parts which accurately set forth the terms and conditions of the purchases made on behalf of the joint adventure.

65. On numerous occasions from about June 1979 to about August 1982, in furtherance of the pattern of the racketeering activity and in violation of the RICO statute, IMREX, JACOB ARMON and GIDON ARMON prepared and/or caused to be prepared fraudulent purchase orders which misrepresented to SEDIMA the terms and conditions of purchases of electronic component parts that IMREX made on behalf of the joint adventure.

66. In furtherance of the pattern of the racketeering activity and in violation of the RICO statute, IMREX, JACOB ARMON and GIDON ARMON sent and/or caused to be sent through the United States mails, fraudulent purchase orders to SEDIMA with the intent to and for the sole purpose of defrauding SEDIMA.

67. In furtherance of the pattern of racketeering activity and in violation of the RICO statute, IMREX, JACOB ARMON and GIDON ARMON communicated with SEDIMA on numerous occasions by means of the United States mails and by telephone, thereby misrepresenting the terms and conditions of the purchases that IMREX had made on behalf of the joint adventure.

68. The aforesaid conduct was part of a scheme to defraud plaintiff and constituted separate and numerous violations of the Mail Fraud Act (18 U.S.C. §1341) and the Wire Fraud Act (18 U.S.C. §1343).

69. IMREX, JACOB ARMON and GIDON ARMON caused IMREX employees to calculate the cost of certain electronic component parts, as well as all attendant costs.

70. In furtherance of the pattern of the racketeering activity and in violation of the RICO statute, on numerous occasions from

about June 1979 to about August 1982, IMREX, JACOB ARMON and GIDON ARMON received those calculations from IMREX's employees and on numerous occasions deliberately prepared and caused to be prepared invoices addressed to SEDIMA, as well as credit memoranda addressed to SEDIMA, which misrepresented the actual costs incurred by IMREX and overstated those costs to SEDIMA.

71. In furtherance of the pattern of the racketeering activity and in violation of the RICO statute, IMREX, JACOB ARMON and GIDON ARMON caused the calculations compiled by their employees and their own calculations to inflate the costs of electronic component parts to be destroyed.

72. In furtherance of the pattern of the racketeering activity and in violation of the RICO statute, IMREX, GIDON ARMON and JACOB ARMON caused said fraudulent invoices and credit memoranda to be deposited in the United States mails for delivery to SEDIMA with the intent to and for the sole purpose of defrauding SEDIMA.

73. The aforesaid pattern of racketeering on the part of IMREX, JACOB ARMON and GIDON ARMON was accomplished by placing or causing to be placed in the United States mails, on more than one occasion, from about June 1979 to about August 1982, false and fraudulent purchase orders, invoices and credit memoranda.

74. As a direct and proximate result of the aforesaid conduct of IMREX, JACOB ARMON and GIDON ARMON, plaintiff has been damaged in an amount yet undetermined but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

TENTH COUNT AGAINST IMREX, JACOB ARMON AND GIDON ARMON

75. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through "22", "25" through "29", "32" through "36" and "61" through "73" as if set forth in full here.

76. IMREX, JACOB ARMON and GIDON ARMON, in violation of the Racketeer Influenced and Corrupt Organizations ("RICO") statute (18 U.S.C. §1962(c)), while associated with and/or employed by an enterprise engaged in and/or the activities of which affected interstate and foreign commerce, conducted and participated in the conduct of such enterprise's affairs through a pattern of racketeering activity.

77. Plaintiff has been injured in its business by reason of the aforesaid violation of the RICO statute and may recover treble damages and the cost of this suit, including reasonable attorney's fees, as a result thereof, pursuant to 18 U.S.C. §1964(c).

78. IMREX was at all times herein an enterprise engaged in, and the activities of which affected, interstate and foreign commerce.

79. IMREX, JACOB ARMON and GIDON ARMON, at all times herein, were associated employed by and/or associated with IMREX, in that they substantially participated in the operation of IMREX. Said participation consisted of the managment of the daily operations of IMREX and the formation and implementation of the corporate policies of IMREX.

80. IMREX, JACOB ARMON and GIDON ARMON at all times herein, directly and indirectly, conducted and participated

in the conduct of IMREX through a pattern of racketeering in violation of 18 U.S.C. §1962(c).

81. As a direct and proximate result of the aforesaid conduct of IMREX, JACOB ARMON AND GIDON ARMON, plaintiff has been damaged in an amount yet undetermined but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

ELEVENTH COUNT AGAINST JACOB ARMON AND GIDON ARMON

82. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" through "22", "25" through "29", "32" through "36", "56" through "73" and "76" through "80".

83. JACOB ARMON and GIDON ARMON conspired to violate the provisions of 18 U.S.C. §1962(c).

84. The aforesaid conspiracy constituted a violation of 18 U.S.C. §1962(d).

85. In furtherance of the aforesaid conspiracy, JACOB ARMON and GIDON ARMON prepared or caused to be prepared false and fraudulent purchase orders, invoices and credit memoranda.

86. In furtherance of the aforesaid conspiracy, JACOB ARMON and GIDON ARMON sent, or caused to be sent, through the mails, the false and fraudulent purchase orders, invoices and credit memoranda.

87. As a direct and proximate result of the aforesaid conduct of JACOB ARMON and GIDON ARMON, plaintiff has been damaged in an amount yet undetermined but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS.

WHEREFORE, SEDIMA demands judgment:

(a) On the First Count, against IMREX in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS in compensatory damages.

(b) On the Second Count, that IMREX account to SEDIMA for all monies and property received and disbursed or assigned by it and of all its acts and doings in connection with said joint adventure; that SEDIMA have judgment against IMREX for all moneys wrongfully obtained by IMREX from SEDIMA in an amount yet undetermined but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS, and for such other and further relief as may be just with the costs of this action.

(c) On the Third Count, against IMREX, JACOB ARMON and GIDON ARMON, jointly and severally, in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS in compensatory damages, and in the amount of ONE MILLION ($1,000,000) DOLLARS in punitive damages, and the costs and attorney's fees for prosecuting this action.

(d) On the Fourth Count, against IMREX in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY

FIVE THOUSAND ($175,000) DOLLARS in compensatory damages, and in the amount of ONE MILLION ($1,000,000) DOLLARS in punitive damages, and the costs and attorney's fees for prosecuting this action.

(e) On the Fifth Count, against IMREX in the sum of THIRTY FIVE THOUSAND ($35,000) DOLLARS.

(f) On the Sixth Count, against IMREX in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS in compensatory damages, and in the amount of ONE MILLION ($1,000,000) DOLLARS in punitive damages, and the costs and attorney's fees for prosecuting this action.

(g) On the Seventh Count, against IMREX in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS in compensatory damages, and in the amount of ONE MILLION ($1,000,000) DOLLARS in punitive damages, and the costs and attorney's fees for prosecuting this action.

(h) On the Eighth Count, against IMREX in a sum as yet undetermined, but not less than ONE HUNDRED SEVENTY FIVE THOUSAND ($175,000) DOLLARS in compensatory damages, and in the amount of ONE MILLION ($1,000,000) DOLLARS in punitive damages, and the costs and attorney's fees for prosecuting this action.

(i) On the Ninth Count, against IMREX, JACOB ARMON and GIDON ARMON for treble damages and the costs of this suit, including attorneys fees, pursuant to 18 U.S.C. §1964(c).

Amended Complaint

(j) On the Tenth Count, against IMREX, JACOB ARMON and GIDON ARMON for treble damages and the costs of this suit, including attorneys fees, pursuant to 18 U.S.C. §1964(c).

(k) On the Eleventh Count, against JACOB ARMON and GIDON ARMON for treble damages and the costs of this suit including attorneys fees, pursuant to 18 U.S.C. §1964(c).

(l) For such other and further relief as to this Court may seem just and proper.

Dated: New York, New York
May 26, 1983

ORENSTEIN SNITOW &
SUTAK P.C.
Attorneys for Plaintiff
SEDIMA S.P.R.L.

By: _____
Franklyn H. Snitow,
A Member of the Firm

750 Third Avenue
New York, New York 10017
(212) 687-1166

MEMORANDUM AND ORDER OF GLASSER, J. DATED NOVEMBER 14, 1983

[Omitted here but printed in the Appendix to the Petition for Writ of Certiorari found at pp. 60a-63a.]

MEMORANDUM AND ORDER OF GLASSER, J. DATED NOVEMBER 18, 1983

[Omitted here but printed in the Appendix to the Petition for Writ of Certiorari found at p. 64a.]

NOTICE OF APPEAL

UNITED STATES DISTRICT
COURT EASTERN DISTRICT OF NEW YORK

82 Civ. 2161 (ILG)

SEDIMA, S.P.R.L.,

Plaintiff-Appellant,

- against -

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Defendants-Appellees.

Notice is hereby given that Sedima, s.p.r.l., plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Orders of District Judge I. Leo Glasser of the Eastern District of New York filed November 16, 1983 and amended November 18, 1983 dismissing the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. Section 1962, *et seq.* ("RICO") claims in the amended complaint.

Dated: November 23, 1983.

ORENSTEIN SNITOW &
PAULEY, P.C.
Attorneys for Plaintiff,
Sedima, s.p.r.l.,

Notice of Appeal

By: William H. Pauley, III
A Member of the Firm

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TO:

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FINAL JUDGMENT OF DISMISSAL DATED DECEMBER 1, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 82-2161

SEDIMA S.P.R.L.,

Plaintiff,

-against-

IMREX COMPANY, INC., GIDON ARMON, and JACK ARMON,

Defendants.

A memorandum and order of Honorable I. Leo Glasser, United States District Judge, having been filed on November 22, 1983, directing,pursuant to Rule 54(b), Fed.R.Civ.P., there being no just reason to delay the appeal from the order dated November 14, 1983 dismissing plaintiff's RICO claims,that the dismissal be entered as a final judgment, it is

ORDERED and ADJUDGED that pursuant to Rule 54(b), Fed.R.Civ.P., there being no just reason to delay the appeal from the order dated November 14, 1983 dismissing plaintiff's RICO claims, the dismissal is entered as a final judgment.

s/ Robert C. Heinemann
Clerk of Court

Dated: Brooklyn, New York
December 1, 1983

MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

83-7965

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of July one thousand nine hundred and eighty-four.

Present:

HON. J. EDWARD LUMBARD

HON. JAMES L. OAKES

HON. RICHARD J. CARDAMONE

Circuit Judges,

SEDIMA, S.P.R.L.,

Appellant,

-v.-

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Appellees.

Appeal from the United States District Court for the Eastern District of New York.

Mandate

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

s/ Edward J. Guardaro
Deputy Clerk

9999
THE MANDATE, CONSISTING OF THE ITEMS BELOW, HAS BEEN RECEIVED.
/_____/ OPINION /_____/ ORDER
/_____/ STATEMENT OF COSTS
REC'D. BY Williams DATE 8/21/84

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[Omitted here but printed in the Appendix to the Petition for Writ of Certiorari found at pp. 1a-59a.]

FILED
FEB 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-648

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX CO., INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a criminal conviction for 18 U.S.C. § 1961(1) (1978) predicate acts is required before a private litigant can recover civil damages under RICO?

2. Whether a showing of "mobster"-type or other distinct injury is essential before a private litigant can recover civil damages under RICO?

STATEMENT PURSUANT TO RULE 28.1

Sedima, S.P.R.L., has no parent companies, subsidiaries or affiliates.

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No. 84-648

In The

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX CO., INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

OPINIONS AND ORDERS BELOW

On July 25, 1984, the court of appeals filed an opinion and entered a judgment in *Sedima v. Imrex,* 741 F.2d 481 (2d Cir. 1984) (No. 83-7965) (Pet. App. 1a-59a), *cert. granted,* 105 S. Ct. 901 (Jan. 14, 1985) (No. 84-648). The judgment is set forth in the Joint Appendix (J. App. 32a).

* The assistance in the preparation of this brief of Benjamin M. Pinczewski (St. John's Law School '85) is hereby acknowledged.

On November 16, 1983, the district court filed a memorandum and order which it then supplemented on November 18, 1983, in *Sedima v. Imrex,* 574 F. Supp. 963 (E.D.N.Y. 1983) (No. 82 Civ. 2161) (Pet. App. 60a-64a).

JURISDICTION

The judgment of the court of appeals (J. App. 32a) was entered on July 25, 1984. The petition for a writ of *certiorari* was filed on October 19, 1984, and granted on January 14, 1985. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, Section 1961.

Definitions

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

* * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this

chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Title 18, United States Code, Section 1962.

Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Title 18, United States Code, Section 1964.

Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioner Sedima, S.P.R.L. ("Sedima"), filed a civil action in the United States District Court for the Eastern District of New York on July 23, 1982. A timely answer was interposed by the respondents Imrex Company, Inc. ("Imrex") and Gidon Armon.

After some discovery in the form of depositions and document production, Sedima moved for leave to amend its complaint to allege claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1978) (as amended) (originally promulgated as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 901(a), 84 Stat. 941 (1970), and amended Pub. L. No. 95-575, § 3(c), 92 Stat. 2465 (1978); Title III, Pub. L. No. 95-598, § 3(c), 92 Stat. 2677) (1978) and to add Jacob Armon as a defendant. The motion was granted on consent by a stipulation and order and the amended complaint was served.

By notice of motion dated July 7, 1983, Imrex and the Armons moved to dismiss the RICO claims asserted against them in the amended complaint (J. App. 5a).

Sedima, a Belgian corporation headquartered in Brussels, is a supplier of electronic, mechanical and hydraulic components for the aerospace and defense industries. Imrex, a New York corporation headquartered in Great Neck, New York, is engaged in the export of aircraft and aircraft-related electronic parts for the aerospace industry. At the relevant times, Gidon Armon was the president and a shareholder of Imrex and his son Jacob Armon was an officer of the company. After the start of this action, Gidon Armon stepped aside as president and his son Jacob assumed that title.

In late 1977, Sedima learned that the North Atlantic Treaty Organization ("NATO") was about to commence a program to

overhaul and upgrade HAWK missile systems deployed in Belgium. The program was planned in two steps known as "Belhip" and "PIP" under the auspices of Ateliers de Constructions Electriques Charleroi ("A.C.E.C.") (J. App. 9a).

In 1979, Sedima, through its founder and director Menachem Weiss, and Imrex through its then president Gidon Armon, entered into a joint venture for the purpose of supplying the electronic and hydraulic components for the HAWK missile programs to A.C.E.C. They agreed to share equally in the profits and losses of the joint venture (J. App. 9a).

The amended complaint then describes the way in which the joint venture operated. Sedima was responsible for procuring orders from A.C.E.C. and supplying Imrex with the part specifications and identities of the authorized manufacturers or vendors (J. App. 9a). In addition, Sedima was responsible for negotiating on behalf of the joint venture with A.C.E.C.(J. App. 9a). For its part, Imrex executed the orders in the United States on behalf of the joint venture and provided Sedima with trade documentation (J. App. 9a).

When A.C.E.C. ordered electronic components from the joint venture, Sedima advised Imrex and furnished part specifications and manufacturer's information as required by NATO. In turn, Imrex issued purchase orders to the authorized manufacturer setting forth the specifications. As confirmation that the purchase had in fact been made and as a representation of the price and other terms, Imrex was required to send Sedima a copy of each purchase order that it issued.

The amended complaint describes the fraud that occurred (J. App. 10a-13a). Rather than sending copies of the actual purchase orders, the Armons, as officers of Imrex, prepared bogus purchase orders which they caused to be mailed to Sedima (J.

App. 10a). These bogus purchase orders overstated the cost of component parts and misrepresented the terms on which they were purchased by the joint venture (J. App. 10a).

Later, when Imrex assembled orders for shipment to Europe, the Armons caused Imrex to send credit memoranda overstating the cost of the electronic parts being shipped (J. App. 10a). These credit memoranda were supposed to recite the sales price for the particular shipment and the actual price paid by the joint venture for those items. Imrex was paid on the basis of the fraudulent credit memoranda that it sent to Sedima with the shipments.[1]

1. For example, the record below on the motion to dismiss shows that in June 1980 A.C.E.C. purchased a transistor part number JANTX2N2369A from the joint venture. After receiving that order from Sedima, Imrex purchased those transistors from Schweber Electric in New York at a unit price of $4.83. When Imrex sent the true purchase order to Schweber, the Armons created a bogus purchase order showing a unit price of $5.25 which Imrex then sent to Sedima. While the true purchase orders were kept in Imrex's accounting department, the Armons personally maintained a confidential file containing copies of the bogus purchase orders that had been sent to Sedima. Indeed, they made handwritten notations on the purchase orders for the purpose of keeping themselves informed about what had been falsified.

Later, when a shipment was being readied for Sedima, Imrex's traffic department generated an invoice addressed to Sedima listing the specific components and the sales prices to be charged A.C.E.C. The traffic department also prepared a credit memorandum for Sedima. This document accompanied each invoice and showed the total sales price of the invoiced items, deducted the costs of materials and calculated the profit to be divided between the joint venturers.

The Armons have testified that after the invoices and credit memos were prepared by the traffic department, they personally reviewed them. At that time, they secretly recomputed the cost of materials for each of the items listed on invoices addressed to Sedima so that the cost of material on the credit memo could include the falsely inflated prices appearing on the bogus purchase orders. After recomputing the credit memo, a new credit memo was created reflecting the inflated cost of materials.

As a result of these misrepresentations, the amended complaint alleges that Sedima was led to believe that the joint venture was paying more money to acquire the component parts than was actually the case (J. App. 10a). When the profits were divided, Imrex received its share as well as that amount by which the Armons had inflated the cost of the materials (J. App. 10a).

The RICO claims in the amended complaint assert that Imrex and the Armons "while associated with and/or employed by an enterprise engaged in and/or the activities of which affected interstate and foreign commerce, conducted and participated in the conduct of such an enterprise's affairs through a pattern of racketeering activities." (J. App. 18a). The amended complaint also alleges that Imrex and the Armons "sent and/or caused to be sent through the United States mails, fraudulent purchase orders to Sedima with the intent to and with the sole purpose of defrauding Sedima." (J. App. 20a).

Many acts of mail fraud and wire fraud are pleaded by alleging that Imrex and the Armons "communicated with Sedima on numerous occasions by means of the United States mails and by telephone thereby misrepresenting the terms and conditions of the purchases that Imrex had made on behalf of the joint venture." (J. App. 20a). That claim is particularized in a subsequent allegation where the amended complaint asserts "Imrex and the Armons caused said fraudulent invoices and credit memorandum to be deposited in the United States mails for delivery to Sedima with the intent to and for the sole purpose of defrauding Sedima." (J. App. 20a). Sedima also tracked the statutory language when it alleged that it "has been injured in its business by reason of the aforesaid violation of the RICO statute."[2] (J. App. 22a).

2. The secret moneys that Imrex received because of its bogus purchase orders were deposited into Imrex's corporate accounts and used by the Armons in the operation of their business. By that device, Imrex and the Armons harmed Sedima and enhanced their ability to harm others.

Between 1979 and the start of this litigation, approximately $8,500,000 in orders were received by Sedima on behalf of the joint venture from A.C.E.C. (J. App. 19a). Sedima alleges its injury due to the fraud exceeded $175,000 (J. App. 15a).

In the final count of the amended complaint Sedima alleges that the Armons conspired to violate the provisions of 18 U.S.C. § 1962(c) and that the alleged conspiracy constituted a violation of 18 U.S.C. § 1962(d) (J. App. 23a).

The district court dismissed the RICO counts in the amended complaint on the grounds that there was no allegation of RICO-type injury apart from that which would have resulted directly from the 18 U.S.C. § 1961(1) predicate acts. After an express direction for the entry of judgment pursuant to Fed. R. Civ. P. 54, Sedima appealed.

The court of appeals affirmed the district court and held that, aside from a showing of "mobster"-type harm or other distinct injury, a criminal conviction on the 18 U.S.C. § 1961(1) predicate acts was necessary to bring a civil RICO claim.

SUMMARY OF ARGUMENT

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1978) (as amended), provides for treble damages to "any person injured in his business or property by reason of a violation of section 1962 . . . ." 18 U.S.C. § 1964(c). Violations of section 1962 include "conduct[ing] or participat[ing] . . . in the conduct of [an] enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). "A pattern of racketeering activity" is defined in section 1961 as "at least two acts of racketeering activity . . . within ten years," 18 U.S.C. § 1961(5), and "racketeering activity" is defined to include within its reach "any act which is indictable under . . .

section 1341 (relating to mail fraud) [or] section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1).

The interlocking definitions of the Act and their selective use show that Congress carefully considered the linkages between them. The plain language of section 1962 when read with section 1964(c) authorizes civil suits against all persons who engage in "indictable" acts. A prior criminal conviction for predicate acts is not required to perfect a RICO civil claim.

Section 1964(c) is a civil remedy and as general reform legislation, Congress directed that RICO "be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452 § 904(a) (1970).

The prior criminal conviction requirement imposed by the court of appeals as a condition precedent to maintaining a civil RICO claim is clearly in error. It is contradicted by the unambiguous language of the statute, the intent expressed in the legislative history and the overwhelming majority of case authorities.

The judical engraftment of a prior conviction requirement has emasculated the statute and tied the rights of private litigants to the outcome of criminal prosecutions. The court of appeals overstepped its Article III authority and impermissibly intruded on Congress' Article I power. Therefore, this Court has a clear basis for exercising its power to reverse the decision below.

The language of section 1964(c) authorizes a civil claim whenever any injury is sustained "by reason of" a RICO "violation". Despite the plain language of that statute, the court of appeals dismissed Sedima's RICO claims on the grounds that it had not alleged a "mobster"-type injury. The court never defined that term nor did it distinguish between a "mobster"-type injury

and an injury caused by the operation of an enterprise through a pattern of racketeering.

The limitation imposed by the court of appeals cannot be justified on the basis of the language of civil RICO. The court of appeals improperly inferred its existence by analogy to the antitrust laws. However, their rationale is fundamentally flawed because RICO and the antitrust laws do not have a common purpose. Antitrust injury arises out of the need to distinguish between damages that will promote competition and those that will not. That need is absent from RICO since its broad purpose is to secure compensation for "any person" victimized by a RICO violation.

Congress intended RICO to be an instrument for both the government and private litigants to combat "racketeering." "Racketeering" is not a status, it is proscribed activity. By requiring a "mobster"-type injury, the court of appeals has imposed an artificial and unwarranted burden on RICO plaintiffs.

ARGUMENT

I.

THE JUDICIALLY-FORGED PROHIBITION AGAINST CIVIL RICO CLAIMS ABSENT PREDICATE ACT CONVICTIONS IS AN IMPERMISSIBLE INFRINGEMENT ON LEGISLATIVE AUTHORITY.

Employing casuistic reasoning, the court of appeals held that "a prior criminal conviction [of predicate acts] is a prerequisite to a civil RICO action." (Pet. App. 28a). This court-made requirement of a prior criminal conviction for 18 U.S.C. § 1961(1) predicate acts is a direct affront to the Legislative power vested in Congress. It flies in the face of the unambiguous language of § 1964(c) and other pertinent provisions of RICO, disregards relevant legislative history, and conflicts with most of the decisions that have ruled on this issue.

A. The plain language of RICO does not require a predicate act conviction to perfect an 18 U.S.C. § 1964(c) claim.

Analysis of RICO begins with its text. *Russello v. United States,* 104 S. Ct. 296, 299 (1983) (quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)). Section 1964(c) unambiguously provides that "[a]ny person injured in his business or property by reason of a *violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold damages he sustains and the cost of the suit, including a reasonable attorney's fee." (Emphasis supplied.) Thus, the civil remedies provision directs the reader to the prohibited activities section, says nothing about the need for a prior criminal conviction, and does not support the prior conviction requirement engrafted on the statute by the court of appeals.

In turn, the prohibited activities statute speaks in terms of persons who "conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). To understand what Congress meant by the use of the technical term "pattern of racketeering activity" one must look to the definitions contained in the statute.

Congress provided the answer in 18 U.S.C. § 1961. In a concise and controlled schema, it defined "racketeering activity" as *inter alia* "any act which is indictable under . . . [*inter alia*], section 1341 (relating to mail fraud), section 1343 (relating to wire fraud)." 18 U.S.C. § 1961(1). Linked to that definition was the term "pattern of racketeering activity" which Congress defined as "at least two acts of racketeering activity . . . within ten years . . . ." 18 U.S.C. § 1961(5). These definitions are interlocking and their selective use in the operative provisions of the statute shows that Congress carefully considered the linkages. Given the statutory craftsmanship in the selective use of defined terms, the court of appeals was wrong to disregard linkages. *See Haroco v. Am. Nat'l Bank & Trust Co. of Chicago,* 747 F.2d 384, 386 (7th Cir. 1984) (RICO is "constructed on the model of a treasure hunt.").

Thus, the plain language of section 1962 when read with section 1964(c) authorizes a civil suit against "any person . . . [who] conduct[s] or participate[s] . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962. Section 1962, it should be understood, "is *not* a criminal statute; it says 'unlawful,' not criminal. . . . [T]he role of § 1962 is to set a legal standard, not to define a crime." G. Blakey, *The RICO Civil Fraud Action in Context: Reflection on Bennett v. Berg,* 55 Notre Dame L. Rev. 237, 243 (1982) [hereinafter cited as *Civil Action*].

Assuming that "legislative purpose is expressed by the ordinary meaning of the words used," RICO nowhere requires

that a civil defendant be previously "convicted" of the predicate acts alleged in the amended complaint. The statute only requires that the acts in question be "indictable," or that there be a "violation" not a conviction. *Russello,* 104 S. Ct. at 299 (quoting *Richards v. United States,* 369 U.S. 1, 9 (1962)).

The Random House Dictionary of the English Language (unabridged ed.) (1967) defines "violation" as "a breach, infringement or transgression . . . ." Similarly, *Black's Law Dictionary* (5th ed. 1979) defines a violation as "injury; infringement; breach of right, duty or law . . . ." Such a violation of section 1962 occurs when an individual or entity engages in specified "unlawful" conduct. "Unlawful conduct" includes *inter alia* participating in the conduct of such an enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. § 1962 (1970).

Thus, if a civil defendant engages in the specified unlawful conduct, then he has violated section 1962 and is subject to being sued under section 1964(c). The statute does not say that he has to be convicted; it requires only that the civil defendant engaged in a prohibited activity.

The language of RICO's civil provisions is not concerned with any ultimate determination made in the context of a criminal proceeding or even whether a prosecution has been initiated. Rather, it focuses on a description of the acts engaged in by the putative civil defendant. Thus, the key words are "chargeable" and "indictable." In ascertaining what constitutes "chargeable" or "indictable" acts, the words must be understood according to their "ordinary meaning." *Russello,* 104 S. Ct. at 299 (1983).

Webster's Ninth New Collegiate Dictionary (1983) defines the suffix "-able" as meaning "capable of, fit for, or worthy of." *The American Heritage Dictionary of the English Language* (1981) says "susceptible, capable, or worthy of." *Webster's Third*

New International Dictionary (unabridged ed. 1961) instructs that the meaning of the suffix "-able" is "capable of, fit for, or worthy of (being so acted upon or toward) — chiefly in adjectives derived from verbs . . . ." Thus, the suffix "-able" does not mean, in fact, actually acted upon.

A civil RICO defendant who has committed predicate acts is "chargeable" or "indictable" and thus susceptible to criminal prosecution. His acts must fall within the conduct prescribed by the criminal statutes enumerated by RICO. Once his conduct comes within the ambit of the criminal statute he is a proper party defendant in a civil RICO action. RICO's language requires the commission of the acts in the conduct of the enterprise. RICO does not require the civil defendant to have been actually charged or indicted — much less convicted or punished — for those acts.

Sedima alleges in its amended complaint that Imrex and the Armons participated in the affairs of an enterprise through a "pattern of racketeering." (J. App. 18a, 20a, 22a).

The "racketeering activity" necessary for a violation of § 1961(1)(B) (1978) includes certain predicate acts "chargeable under State law" or "indictable" under, *inter alia,* 18 U.S.C. § 1341 (1970) (relating to mail fraud) or 18 U.S.C. § 1343 (1956) (relating to wire fraud). Numerous "indictable" acts of mail fraud and wire fraud are pleaded in the amended complaint.

Despite the ordinary meaning of the words, the court of appeals transmogrified the words "chargeable" and "indictable" to "previously convicted." It ignored the plain meaning of the words, choosing instead to define them in terms of what it guessed Congress might have intended. The court of appeals stated:

> As for the language "any act which is indictable" (or "chargeable"), conceivably

> Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies informations, are not required, since the acts need only be "indict*able*" or charge*able*" (emphasis added). But a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether an act is "indictable" in the absence of the properly returned indictment or "chargeable" absent an information. Courts do not traditionally look at a given set of facts — proved by a preponderance of the evidence only — and say that these facts make out acts which are "indictable" or "chargeable."

(Pet. App. 35a-36a).

This analysis is clearly at variance with normal rules of construction. "[A]bsent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States v. Apfelbaum,* 445 U.S. 115, 121 (1980) (construing Title II of the Organized Crime Control Act). The ruminations of the majority in Sedima about "plausible alternatives" to what "conceivably Congress meant" do not even approach evidence of contrary legislative intent.

The court of appeals' analysis is belied by the structure of the Organized Crime Control Act as a whole and Title IX in particular. The Organized Crime Control Act "is a carefully crafted piece of legislation." *Iannelli v. United States,* 420 U.S. 770, 789 (1975). Conspicuously absent is any suggestion that prior convictions are required to bring a civil RICO claim.

Indeed, when Congress required a conviction as part of the legislative scheme of the Organized Crime Control Act, it knew how to say it. Title X, 18 U.S.C. §§ 3575-3578 (1970), speaks of "conviction[s]" at several points. *See, e.g.,* 18 U.S.C. §§ 3575(d)-(e), (g), 3576-3577. *Cf. Iannelli,* 420 U.S. at 786-89 (construing Title VII in light of Titles IX and X).

Even RICO itself demonstrates Congress' deliberate avoidance of a prior conviction requirement in § 1964(c). That Congress was careful is reflected by its selective use of the term "conviction" within the RICO statute. Neither the term "conviction" nor any variant thereof appears in §§ 1961, 1962, or 1964(c). In the same way that § 1964(c) provides that violations of § 1962 create a private right of action for damages, § 1963 provides that violations of § 1962 are criminal.[3] "If Congress had intended to limit liability under § 1964(c) only to those convicted of or charged with RICO crimes, it would have done so within § 1964(c) by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in § 1964(c) only to the unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963." *Bunker Ramo Corp v. United Business Forms,* 713 F.2d 1272, 1287 (7th Cir. 1983) (quoting *USACO Coal Co. v. Carbomin Energy,* 689 F.2d 94, 95 (6th Cir. 1982)). Congress' decision not to use the term "conviction" in § 1964(c) manifests an intent to authorize civil RICO claims in the absence of prior criminal convictions for 18 U.S.C. § 1961(1) predicate acts.

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3. Section 1963(c) provides that "[u]pon *conviction* of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under the section . . . ." (Emphasis supplied.)

Similarly 18 U.S.C. § 1964(d) (1970) provides that a previously convicted RICO defendant shall be estopped "from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States."

B. The legislative history of RICO underscores the statute's preventive and remedial purposes and does not suggest that a criminal conviction is a condition precedent to a civil claim.

RICO's legislative history supports the conclusion that prior convictions of 18 U.S.C. § 1961(1) predicate acts are unnecessary to the prosecution of civil claims under the statute.

Congress' intent that § 1964 be a remedial statute could not be more explicit. 84 Stat. 947 (1970) ("remedial purposes"); S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969) (Title IX "[is] remedial rather than penal"); *United States v. Turkette,* 452 U.S. 576, 593 (1981) (RICO is "both preventive and remedial"). Senator Hruska observed: "[T]he criminal provisions are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill." 115 Cong. Rec. 6993 (1969). Concern about frivolous suits under civil RICO led Representative Mikva to acknowledge that "there need not be a conviction under any of these laws for it to be racketeering." 116 Cong. Rec. 35,342 (1970). The court of appeals' attempt to discount Representative Mikva's remarks is embarrassing.[4]

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4. The court of appeals was obviously aware of this legislative history, but chose to disregard it. Downplaying the significance of other remarks made by Representative Mikva in connection with his proposed amendment, the court of appeals stated: "Deriving legislative intent from a dissenting congressman's 'parade of horrors' speeches in opposition is a notoriously dubious practice." (Pet. App. 16a n.22.)

The implication that Representative Mikva did not understand the scope and intent of civil RICO is unwarranted. Representative Mikva was a former law clerk in the United States Supreme Court. He served on the National Commission on Reform of the Federal Criminal Law, which examined a number of concepts subsequently embodied in RICO. *See Civil Action, supra,* p. 12, at 253 n.47. He was a member of the House Judiciary Committee which studied the bill. Representative Mikva, now a judge in the District of Columbia Circuit, obviously knew what he was saying when he commented that a prior conviction was unnecessary.

That § 1964 is intended to be remedial also reflects the judgment of Congress since 1970. The Senate Judiciary Committee, in reporting out the criminal code bill in 1981, described RICO in these terms: "[I]t is hoped the knowledge that a person will be subject to substantial civil damages will serve as an effective deterrent to the commission of . . . [a RICO] offense. [However,] [t]he purpose of the [treble damage civil recovery] . . . is remedial, not penal; adequate relief or compensation is the main goal." *Civil Action, supra,* p. 12, at 237, 267.

The court of appeals, by contrast, derived its view of Congress' intent from a skewed analysis of RICO's language. It began by noting that "[t]he Act is designed to provide new penalties and remedies to combat conduct which explicitly has *already been found criminal.*" (Pet. App. 37a; emphasis supplied). To support its predisposition, the court of appeals relied on Professor G. Robert Blakey's comment that RICO did not itself " 'draw a line between criminal and innocent conduct,' but rather 'authorized the imposition of different criminal or civil remedies for conduct already criminal, when performed in a specified fashion.' "[5] (Pet. App. 37a; emphasis in original).

Not only did the court of appeals alter Professor Blakey's words, it wrenched them out of context. In fact, Professor Blakey was arguing that "[o]nce the policies of strict construction or leniency had been implemented in the construction of the underlying 'racketeering activity,' and the line had been crossed into the sphere of criminality, it was inappropriate to further

5. *See* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies,* 53 Temp. L.Q. 1009, 1032 (1980) [hereinafter cited as *"Basic Concepts"*]. Professor Blakey was the Chief Counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-70 when the Organized Crime Control Act was processed.

restrict the scope of the statute by reapplying these policies." *Basic Concepts, supra,* p. 18 n.5, at 1032. This argument does not aid the court of appeals' reasoning, instead, it undermines the majority's narrow interpretation of § 1964(c).

In buttressing its contention that criminal convictions must precede civil claims, the majority went on to state that although "RICO liability simply does not exist without criminal conduct," nonetheless, "in a civil context, there is no way to know whether the conduct in question is 'already criminal.' " (Pet. App. 38a). The court conjectured that, "had Congress considered this problem, it would have explicitly required previously established convictions in the context of section 1964(c)."[6] After analyzing certain problems (*e.g.,* burden of proof) "of which there is no indication that Congress even dreamed," (Pet. App. 38a), the majority concluded: "[i]t is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, *it would have intended* criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action." (Pet. App. 41a; emphasis supplied).

Congress not only considered the problem but the consensus was that the burden of proof under the civil remedies section should be a "preponderance of the evidence." For example, Congressman Poff remarked: "[T]itle IX is really in two parts, one criminal and one civil. The burden of proof under the civil-remedies section, section 1964, is much less." *Organized Crime Control: Hearings on S. 30 and Related Proposals before Subcomm. No. 5 of the House Comm. on the Judiciary,* 91st Cong., 2d Sess. 538, 665 (1970) (remarks of Congressman Poff).[7]

6. The court of appeals subsequently noted that Congress omitted "to examine this problem except very obliquely." (Pet. App. 40a n.57).

7. *See Civil Action, supra,* p. 12, at 258 n.59.

Congress has often provided both criminal and civil remedies in exercising its authority to regulate interstate commerce. *United States v. Ward,* 448 U.S. 242, 249 (1980), *reh'g denied,* 448 U.S. 916 (1980). Given the complementing use of civil and criminal penalties in many statutes, there was no justification for the court of appeals' concern that absent a prior criminal conviction, courts could not recognize unlawful activity and address it in the context of a civil case. *See, e.g., United States v. One Assortment of 89 Firearms,* 104 S. Ct. 1099 (1984) (forfeiture proceeding after seizure of firearms for violation of 18 U.S.C. § 922); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 (1972) (forfeiture proceeding for customs fraud); *Helvering v. Mitchell,* 303 U.S. 391 (1938) (recovery of civil monetary penalties for fraudulent evasion of income tax). As Circuit Judge Cardomone noted in his dissent "[t]his implicit conclusion is at odds with analogous case law in such areas as civil forfeitures, penalties and deportation cases which teaches that the correct procedure is for a court in a civil case to assure, on a selective basis, the existence of certain procedural safeguards, that would otherwise be applicable only in criminal cases." (Pet. App. 49a).

The majority in *Sedima* appears to have forgotten the methodology developed by the Court for challenges to civil remedies on the ground they are "quasi-criminal" or sufficiently "punitive" to require the procedural protections of a criminal trial developed by this Court. Just recently, in *United States v. Ward,* 448 U.S. 242 (1980), this court reviewed a challenge to Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §1321(b)(6), which permitted the government to assess a civil penalty of up to $5,000 for each violation of the FWPCA. In applying a two-step analysis, this Court first looked to see "whether Congress, in establishing the penalizing mechanism, indicated . . . a preference for one label or the other." *Ward,* 448 U.S. at 49. If Congress indicated a preference, that expression of intent is entitled to deference. *One Assortment of 89 Firearms,* 104 S. Ct.

at 1106. Where, as with RICO, Congress signalled a preference for a civil penalty, then, the analysis proceeds to a second step to determine whether the statutory scheme is "so punitive either in purpose or effect as to negate that intention." *Ward,* 448 U.S. at 238.

Monetary damages are not sufficiently punitive to require Fifth Amendment criminal safeguards. *See Ward,* 448 U.S. at 249. The recovery of more than actual damages constitutes statutorily determined adequate compensation traditionally allowable in civil proceedings without criminal law safeguards. *See, e.g., United States v. Bornstein,* 423 U.S. 303, 313-16 (1976).

Civil courts have long had the power to determine criminal issues in a civil action subject of course to differing burdens of proof. *Kincade v. Bradshaw,* 3 Hawks (N.C.) 63 (1824). There, in an action for slander, the jury was instructed that the evidence should be such as would convict the plaintiff if he were on trial for the offense.[8]

Thus, the court of appeals twisted statutory construction and construed the broad remedial legislation so narrowly as to make it meaningless. It substituted its judgment for that of the Congress, concluded that the language of the statute was ambiguous, and then derived legislative intent from an examination of that "ambiguous" language. Such a method of analysis can support virtually any proposition, no matter how preposterous.

C. Prior criminal conviction requirement — an unsound judicial engraftment.

Virtually every court that has considered the prior criminal conviction argument rejected it as lacking any support in RICO's

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8. *See,* Groon, *Proof of Crime in a Civil Proceeding,* 39 Minn. L. Rev. 556 (1929).

language or legislative history. (*See* Pet. App. 30a n.42, 31a n.43.) Significantly, most civil RICO decisions have not even thought it an issue worth addressing.[9]

The court of appeals questioned the soundness of those decisions which relied upon *United States v. Cappetto,* 501 F.2d 1351 (7th Cir. 1975), *cert. denied,* 420 U.S. 925 (1975). The majority reasoned: since *Cappetto* dealt solely with the government's ability to secure a civil injunction under § 1964(a), *Cappetto's* rejection of a prior conviction requirement "made no holding with respect to private civil actions." (Pet. App. 29a).

This conclusion ignores the deliberate and parallel use of the term "violation" in §§ 1963(a), 1964(a), and 1964(c). Section 1962, and, therefore § 1961(1), apply equally to all three sections which speak in terms of "violation."[10] The use of "violation" in the civil portion of the statute when juxtaposed against the use of "conviction" in the criminal portion of the statute is a legislative distinction that makes a difference. It points to the structure of RICO as a integrated whole.[11] As Mr. Justice Cardozo stated in

9. Indeed, the district court never mentioned a prior criminal conviction requirement and on appeal the parties never raised it. Phoenix-like, the criminal conviction requirement was raised by the court of appeals *sua sponte* in *Sedima* after the issue appeared to have been long settled.

10. The imposition of a prior criminal conviction requirement, therefore, places the decision below in conflict with the holdings in *United States v. Licavoli,* 725 F.2d 1040, 1047 (6th Cir. 1984) (criminal RICO); *United States v. Malatesta,* 583 F.2d 748, 757 (5th Cir. 1978), *cert. denied sub nom. Bertolotti v. United States,* 440 U.S. 962 (1979) (criminal RICO); and *United States v. Frumento,* 563 F.2d 1083, 1087 (3rd Cir. 1977), *cert. denied sub nom. Sills v. United States,* 434 U.S. 1072 (1978) (criminal RICO).

11. Congressman Poff, one of the sponsors of RICO, observed that in his "experience, no single measure [had] received more thorough consideration than this bill." 116 Cong. Rec. 35,204 (1970).

George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 378 (1933): "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." That unity is present in RICO.

It also ignores Congress' direction that RICO "be liberally construed to effectuate its remedial purpose." Pub. L. No. 91-452, § 904(a) (1970).[12]

Uncomfortable with the scope of § 1964(c), a statute broadly written and conceived, the court of appeals redrafted it, creating a remedy so lacking in force as to nullify Congress' explicit intention to create "new remedies to deal with the unlawful activities of organized crime." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922-23.

The court of appeals overstepped the limits of its Article III authority and impermissibly intruded on Congress' Article I power. *See United States v. Turkette,* 452 U.S. at 587 ("In the face of . . . objections [dealing with federal and state relations] Congress nonetheless proceeded to enact [Title IX] . . . . There is no argument that Congress acted beyond its powers in so doing. That being the case, the Courts are without authority to restrict the application of the statute.").

Speaking for the Court in *United States v. Braverman,* 373 U.S. 405, 408 (1963), Justice Black warned federal courts not to "interpret a statute so narrowly as to defeat its obvious intent." Article III of the Constitution does not confer a court with the power to redraft legislation because of its "appraisal of wisdom

12. There is no conflict between the rule of lenity and the liberal construction clause. *See Tarrant v. Ponte,* 751 F.2d 459 (1st Cir. 1985) (lenity serves only as an aid for resolving an ambiguity; it is not to be used to create one). But, of course, section 1964(c) is a civil provision.

or unwisdom of a particular [legislative] course." *Diamond v. Chakrabarty,* 447 U.S. 303, 318 (1980) (quoting *TVA v. Hill,* 437 U.S. 153, 194 (1978)). This Court has repeatedly cautioned lower court judges that the "interpretation of a statute" is the "starting point" in ascertaining legislative intent. *Lewis v. United States,* 445 U.S. 55, 60 (1980) (citing *Reiter v. Sonotone Corp.,* 442 U.S. 330, 337 (1979)); *see also Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979); *Southeastern Community College v. Davis,* 442 U.S. 397, 405 (1979).

The court of appeals erred by ignoring all these jurisprudential precepts and embarked instead on a perilous course of judicial legislation.

First, the court of appeals determined that the language of § 1964(c) is ambiguous (Pet. App. 10a). That conclusion rested on their observation that RICO "has not proved particularly useful for generating treble damage actions against mobsters by victimized businesspeople. It has, instead, led to claims against such respected and legitimate 'enterprises' as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Sterns & Co., and Merrill Lynch, to name a few defendants labeled as 'racketeers' . . . ." (Pet. App. 9a-10a). Dissenting from that view, Circuit Judge Cardamone asserted that: "[S]tigma alone ordinarily does not suffice to convert a proceeding from civil to criminal. *See Ullmann v. United States,* 350 U.S. 422, 76 S. Ct. 497, 100 L. Ed. 511 (1956) . . . I, for one, believe the public is sophisticated enough to distinguish between a criminal conviction and a civil claim. To be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it." (Pet. App. 55a).

A federal court has "no authority to substitute [its] views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 626 (1978), *reh'g denied,* 439 U.S. 884 (1978). "Once Congress addresses a subject . . .

the task of the federal courts is to interpret and apply statutory law, not to create common law." *Northwest Airlines v. Transport Workers Union,* 451 U.S. 77, 96 n.34 (1981).

Second, the court of appeals determined that "[t]he most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of § 1964(c)." (Pet. App. 19a). Given the unambiguous language of the statute, that conclusion by the court of appeals is just a guess. Imaginative constructs about what Congress might have done cannot take the place of the carefully defined terms in RICO. Such conjecture is clearly impermissible.

Third, putting aside the ordinary meaning of the words of the statute and twisting the legislative history, the court of appeals then devised its own prior convictions and standing requirements. The substitution of private views of judges for regularly enacted statutes should not be countenanced. Because "Congress cannot be expected to specifically address each issue of statutory construction which may arise," *Albernaz v. United States,* 450 U.S. 333, 341 (1981), Congress directed the courts to liberally construe RICO. Perhaps more than anything else, this direction indicates Congress' intent.

The court of appeals *sua sponte* created a prior conviction requirement. By that act of creation it ventured well beyond the established bounds of judicial interpretation. The requirement of prior predicate act convictions is indefensible. This Court has a clear basis for exercising its power to reverse the decision below.

D. The conviction requirement will be a *contra* force on the administration of justice.

A practical effect of a prior conviction requirement will be to create an atmosphere where private litigants are forced to involve themselves in the criminal justice system in order to bolster their

respective civil cases. For their part, plaintiffs will be tempted to press local United States attorneys to commence prosecutions of suspected 18 U.S.C. § 1961(1) predicate acts in order to obtain the prior convictions necessary to bring suit. Defendants, sensing the imminence of a RICO civil claim with concomitant threefold damages and attorneys' fees, will be more likely to ingratiate themselves with state prosecutors in order to ward off federal prosecutions for 18 U.S.C. § 1961(1) predicate acts like mail fraud or wire fraud.

The judicial engraftment of a prior criminal conviction requirement is thus not only bad law but also bad policy. Federal prosecutors will be subject to charges of stalking potential RICO defendants and serving as collection agencies for RICO civil plaintiffs. Federal and state prosecutors alike will be subject to additional and needless pressures from private litigants.

The prior criminal conviction requirement in civil RICO cases will also undermine the prosecution of criminal RICO cases. Whether true or not, the complaining party who testifies in the criminal prosecution will undoubtedly be challenged on the grounds that his testimony, if accepted in the criminal proceeding, will give him standing to sue under civil RICO and recover threefold his damages.

The prior conviction requirement will also make the application of civil RICO haphazard in situations involving multiple participants. For instance, where one of the participants is immunized or negotiates a non-predicate act plea and then admits his participation in § 1962 activities, that self-confessed RICO violator (racketeer) would not be subject to suit under *Sedima*. Similarly, other anomalous situations will undoubtedly arise where a grand jury properly returned a RICO indictment which was subsequently dismissed on grounds having nothing to do with the merits, *viz.*, suppression of critical evidence as a result of government's violation of Fourth Amendment rights.

The prior criminal conviction requirement will also have unsettling repercussions in other areas. For instance, from what date should the statute of limitations on a civil RICO claim begin to run? The date the fraud is discovered or the date the criminal conviction is obtained. From its opinion, there is no indication that the court of appeals "even dreamed" of that problem when it rewrote RICO. Indeed, aside from redrafting RICO, the court of appeals has required a rewriting of the statute of limitations. If Congress had wanted to vary the rule so sharply then they undoubtedly would have done so.

The prior criminal conviction requirement will compound the statute of limitations by splitting causes of action and giving a plaintiff two separate opportunities to prove his allegations of fraud in court. His first day in federal court will come when he proves his common law fraud claim; the second opportunity comes later after the RICO criminal conviction when he proves his RICO civil claim.

The parallel civil and criminal provisions in the RICO statute were modelled on antitrust law. In particular, the legislative scheme for civil actions by private attorneys general was borrowed to carry out Congress' objectives. The majority in *Sedima* guts this legislative plan where private attorneys general sue when they have been victimized by the proscribed activities. The requirement of a criminal conviction turns any private action into a caboose for the government's prosecution.

A final danger with *Sedima* is that once accepted, it will affect other cases. Congress has used the statutory schemer of civil proceedings in the context of criminal statutes with regularity. For instance, Congress approved amendments to the Lanham Act allowing civil actions against trademark racketeers for treble damages "in the case of any violation of section 32(1)(a) of this Act . . ." 18 U.S.C. § 2320 (1984).

II.

A REQUIREMENT OF "MOBSTER"-TYPE INJURY FOR A CIVIL RICO CLAIM IS AN IMPERMISSIBLE INFRINGEMENT ON LEGISLATIVE AUTHORITY.

Contrary to the plain language of § 1964(c), extensive legislative history, and the overwhelming weight of judicial authority, the court of appeals held that standing to sue civilly should be limited to instances where the plaintiff's injury is of the kind caused by "mobsters" who "through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors." (Pet. App. 27a).

A. The plain language of RICO does not require a "mobster"-type or other distinct injury in order for a civil plaintiff to have standing to sue.

In § 1964(c) Congress addressed the type of injury compensable under civil RICO. Congress provided that "*any person*" has standing to sue under civil RICO if that person has sustained an injury to business or property by reason of the commission of any of the activities prohibited by § 1962. (Emphasis supplied.) In ruling as it did, the court of appeals redrafted § 1964(c) to add, in effect, that only a person suffering from an injury to his business or property by reason of the commission of an activity prohibited by § 1962 *of the type caused by mobsters or organized crime,* may sue for threefold damages and attorneys' fees. "[T]he short answer is that Congress did not write the statute that way." *Russello v. United States,* 104 S. Ct. 296, 300 (1983) (quoting *United States v. Naftalin,* 441 U.S. 768, 773 (1979)).

RICO does not require special injury for it does not state that the injury has to be of the type caused by "mobsters" or

the undefined entity known as organized crime. It does not even mention these concepts. Section 1962 only speaks of an injury that is the result of a "pattern of racketeering activity." "Racketeering activity" is defined in § 1961(1) simply as the commission of any of the listed acts.

Not surprisingly, the "mobster"-type injury limitation was dredged up by the court of appeals through inference. According to the court of appeals it is to be implied from the words "by reason of" which are contained in § 1964(c).

The court of appeals' attempts to justify this interpretation of the RICO statute by referring to what it perceives the meaning of those words to be under Section 4 of the Clayton Act. Since the "by reason of" language was construed in *Brunswick Corp. v. Pueblo Bowl-O-Mat,* 429 U.S. 477, 489 (1977), "to require plaintiffs to allege and prove an 'antitrust injury,'" or an " 'injury of the type the antitrust laws were intended to prevent,' " the majority reasoned that the same phrase in the RICO statute was intended as a limitation on standing (Pet. App. 24a-25a). The court of appeals concluded that standing was conferred only on those who could show that they were harmed by a "racketeering injury." (Pet. App. 25a).

Sedima submits that it has sustained a racketeering injury, i.e., an injury arising out of the operation of an enterprise through a pattern of racketeering. "As we read this 'by reason of' language, it simply imposes a proximate cause requirement on plaintiffs." *Haroco v. Am. Nat'l Bank & Trust Co. of Chicago,* 747 F.2d 384, 398 (7th Cir. 1984).

Concluding that the purpose of RICO is to fight mobsters, the majority in *Sedima* held that the injury must be of a kind caused "by mobsters." However, defining injury of a kind caused "by mobsters" was elusive. The *Sedima* majority never explained

how a "mobster"-type injury is different from an injury caused by the conduct of an enterprise "through a pattern of racketeering." As has been stated by the Seventh Circuit: "The initial hurdle for proponents of the racketeering injury is merely to define it, for 'a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it' . . . ." *Haroco,* 747 F.2d at 389 (quoting *Alexander Grant & Co. v. Tiffany Indus.,* 742 F.2d 408, 413 (8th Cir. 1984)).

Sedima's imprecision led ineluctably to confusion even among panels in the Second Circuit. For instance in *Bankers Trust v. Rhoades,* 741 F.2d 511 (2d Cir. 1984), the majority furnished examples of "racketeering enterprise injury." The first illustration is that of an arson victim who subsequently loses his fire insurance because of escalating premiums and then suffers accidental fire damage that goes unreimbursed. The second involved a businessman forced to take on an unwanted partner because an enterprise feloniously caused its customers to withhold their business. "The examples, far from clarifying the racketeering injury requirement, underscore the difficulty of defining its contours." *Bankers Trust,* 741 F.2d at 522 (Cardamone dissenting). They suggest by their facts that direct injuries flowing from predicate acts of a RICO defendant would not be subject to treble damage recovery. As Circuit Judge Cardamone concluded in exasperation: "Stated another way, even a convicted Mafia defendant could escape civil liability for the harm done his intended victim under the majority's reasoning." *Id.*

The central difficulty with the court of appeals' analogy to the antitrust law is that antitrust and RICO do not share a common purpose. The antitrust laws were designed to promote competition, whereas RICO was designed to eradicate organized criminal activity. This dichotomy was put well in *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983):

> [A]nalogies to limitations on standing in the antitrust context are entirely inappropriate here. The antitrust laws are designed to promote competition in the marketplace . . . .
>
> RICO has the opposite purpose. It is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have no applicability here. *See Schact v. Brown, supra* at 1357-58.

(Emphasis in original.)

The purpose for an "antitrust injury" requirement is to distinguish between proper and improper parties. Because of the purpose of RICO, there is no similar or parallel need to winnow claims. A racketeering injury requirement only serves to preclude suit by those intended as proper parties under the plain language of the statute.

The two most popular standing requirements which have been imposed are the "competitive injury" and "racketeering enterprise injury" limitations. The competitive injury requirement is just a transplant of the competitive injury requirement under the antitrust statutes, *see, e.g., Brunswick,* 429 U.S. at 487-89; *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962), to the civil RICO content. *See Bankers Trust Co. v. Feldesman,* 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (1984); *North Barrington Dev. v. Fanslow,* 547 F. Supp. 207 (N.D. Ill. 1980); *Van Schaick v. Church of Scientology of California,* 535 F. Supp. 1125 (D. Mass. 1982); *Erlbaum v. Erlbaum,* 584 F. Supp. 908 (E.D. Pa. 1982); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206 (E.D. Mich. 1981).

The competitive injury requirement would not grant a remedy "to those who have suffered *directly* from the operation of a business 'through a pattern of racketeering,' but only to those injured as competitors." *Schacht v. Brown,* 711 F.2d 1343, 1357 (7th Cir. 1983), *cert. denied sub nom. Arthur Anderson & Co. v. Schacht,* 104 S. Ct. 508 (1983) (emphasis in original).

The majority of courts have either rejected the requirement,[13] or abandoned it in favor of another approach.[14]

13. *See, e.g., Bunker Ramo Corp. v. United Business Forms,* 713 F.2d 1272, 1288 (7th Cir. 1983); *Schacht,* 711 F.2d at 1358; *Bennett v. Berg,* 685 F.2d 1053, 1059 (8th Cir. 1982), *aff'd en banc,* 710 F.2d 1361 (8th Cir. 1983), *cert. denied sub nom. Prudential Ins. Co. v. Bennett,* 104 S. Ct. 527 (1983); *Yancoski v. E.F. Hutton & Co.,* 581 F. Supp 88, 95 (E.D. Pa. 1983); *Slattery v. Costello,* 586 F. Supp 162, at 165-66 (D.C. Cir. 1983); *In re Catanella & E.F. Hutton & Co.,* 583 F. Supp. 1388, 1430 (E.D. Pa. 1984); *Municipality of Anchorage v. Hitachi Cable,* 547 F. Supp. 633 (D. Alaska 1983); *In re Longhorn Securities Litigation,* 573 F. Supp. 255, 270 (W.D. Okl. 1983); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Wilkinson v. Paine, Webber, Jackson & Curtis,* 585 F. Supp. 23 (N.D. Ga. 1983); *Mauriber v. Shearson/American Express,* 556 F. Supp. 1231 1140-41 (S.D.N.Y. 1983); *Eisenberg v. Gagnon,* 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Gitterman v. Vitoulis,* 564 F. Supp. 46, 48 (S.D.N.Y. 1982); *Crocker Nat'l Bank v. Rockwell Intern. Corp.,* 555 F. Supp 47, 49 (N.D. Cal. 1982); *D'Iorio v. Adonizio,* 554 F. Supp. 222, 230 n.5 (M.D. Pa. 1982); *Hanna Mining Co. v. Noreen Energy Resources,* 574 F. Supp. 1172 (N.D. Ohio 1982); *State Farm Fire and Cas. Co. v. Estate of Caton,* 540 F. Supp. 673, 680 (D. Del. 1982); *Hellenic Lines v. O'Hearn,* 523 F. Supp. 244, 248 (S.D.N.Y. 1981).

14. *See, e.g., In re Action Industries Tender Offer,* 572 F. Supp. 846, 851-52 (E.D. Va. 1983) (racketeering injury); *Guerrero v. Katzen,* 571 F. Supp. 714, 720 n.6 (RICO injury); *Barker v. Underwriters at Lloyd's, London,* 564 F. Supp. 352, 358 (E.D. Mich. 1983) (racketeer enterprise injury); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981) (racketeer enterprise injury).

It is far from clear how "racketeering enterprise injury" differs from a "competitive injury." Those courts that have recognized that "competitive injury" is a different kettle of fish, but still want to narrow RICO's scope, have imposed a "racketeering enterprise injury" requirement.[15] None of these courts, however, have defined the concept of a "racketeering enterprise injury" or its parameters. More telling, no court has found it to exist. As with the "competitive injury" requirement, the majority of courts have rejected a "racketeering enterprise injury" limitation.[16]

15. *See Margolis v. Republic National Bank,* 585 F. Supp. 595, 597 (S.D.N.Y. 1984); *Bruns v. Ledbetter,* 583 F. Supp. 1050, 1056 (S.D. Cal. 1984); *Furman v. Cirrito,* 578 F. Supp. 1535, 1539-41 (S.D.N.Y. 1984), *aff'd,* 741 F.2d 524 (2d Cir. 1984); *Hudson v. Larouche,* 579 F. Supp. 623, 630 (S.D.N.Y. 1983); *Haroco v. American National Bank & Trust Co. of Chicago,* 577 F. Supp. 111, 114-15 (N.D. Ill. 1983); *Dakis v. Chapman,* 574 F. Supp. 757, 761 (N.D. Cal. 1983); *Richardson v. Shearson/American Express Co.,* 573 F. Supp. 133, 137 (S.D.N.Y. 1983); *In re Action Industries Tender Offer,* 572 F. Supp. 846, 852 (E.D. Va. 1983); *Bankers Trust Co. v. Feldesman,* 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983), *aff'd sub nom. Bankers Trust Co. v. Rhoades,* 741 F.2d 511 (2d Cir. 1984); *Barker v. Underwriters at Lloyd's, London,* 564 F. Supp. 352, 358 (E.D. Mich. 1983); *Harper v. New Japan Securities Int'l,* 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982); *Landmark Savings & Loan v. Rhoades,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981).

16. *See, e.g., Minpeco S.A. v. Conticommodity Services,* 552 F. Supp. 327 (S.D.N.Y. 1984); *Estee Lauder v. Harco Graphics,* 558 F. Supp. 83 (S.D.N.Y. 1984); *Wilcos v. Ho-Wing Sit,* 586 F. Supp. 561, 568-69 (N.D. Cal. 1984); *In re Catanella & E.F. Hutton & Co.,* 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984); *Laterza v. American Broadcasting Co.,* 581 F. Supp. 408, 414 (S.D.N.Y., 1984); *Charing Cross. v. Riggs Nat'l Bank,* 655 F.2d 1257 (D.D.C. 1983); *Slattery v. Costello,* 586 F. Supp. 162, 167 (D.D.C. 1983); *Yancoski v. E.F. Hutton & Co.,* 581 F. Supp. 88, 96 & n.19 (E.D. Pa. 1983); *Kirschner v. Cable/Tel. Corp.,* 576 F. Supp. 234 (E.D. Pa, 1983); *In re Longhorn Securities Litigation,* 573 F. Supp. 255, 269-70 (W.D. Okla. 1983); *Ralston v. Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983); *Mauriber v. Shearson/American Express,* 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983); *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.,* 567 F. Supp. 1146, 1156-57 (D.N.J. 1983), *aff'd*

(Cont'd)

RICO is not aimed at "racketeers"; the word racketeer is not used in the statute except in its title. Instead, it is aimed at "racketeering"[17] and even then only in the context of "racketeering activity," *i.e.*, organized criminal activity which Congress has defined carefully and precisely in terms of conduct. When Congress decided on severe sanctions both civil and criminal for the affairs of an "enterprise" through a "pattern of racketeering activity" it did not except businessmen like the Armons, or closely-held corporations like Imrex. "[I]t appears that *Sedima* has revived the discredited 'organized crime nexus' requirement without quite saying so." *Haroco*, 747 F.2d at 394. "If the conduct of such people can sometimes fairly be characterized as 'garden variety fraud', we can only conclude that by the RICO statute congress has provided an additional means to weed that 'garden' of its fraud." *Furman v. Cirrito*, 741 F.2d 524, 529 (2d Cir. 1984).

(Cont'd)

in part and rev'd in part, both on other grounds, 742 F.2d 786 (3d Cir. 1984); *Eisenberg v. Gagnon*, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates v. Greenfeld*, 564 F. Supp. 273, 278-79 (D. Md. 1983).

17. Murrary I. Gurfein has explored the etymology of the term:

> Racketeering, a term loosely applied to a variety of criminal schemes has not yet received exact legal definition . . . . It . . . applies to the operation of an illegal business as well as to the illegal operation of a legal business . . . . The word gained currency in the 1920s, but its origin remains obscure . . . . [T]he most plausible [theory notes that the] word racket has long been used to describe a loud noise and hence a spree or party or "good time." In the 1890s social clubs of young men in New York City, under the auspices of political leaders, gave affairs called rackets; since among their number there were members of neighborhood gangs, it was found easy to coerce local tradesman to buy tickets.

Organized Crime in America 181-82 (G. Tyler ed. 1962).

Every circuit court that has considered the issue has refused to read into § 1964(c) any sort of organized crime limitation.[18] The Seventh Circuit aptly noted: "having already rejected the 'organized crime' limitation . . . this court does not wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO." *Schacht v. Brown*, 711 F.2d at 1356. Most recently, the Eighth Circuit flatly rejected the Second Circuit's mobster-type injury requirement as "contrary to our holding in *Bennett*." *Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 108 (1984).

The creation of a mobster-type injury standing requirement is therefore indefensible on any ground.

B. RICO's legislative intent clearly supports civil suits unfettered by a person's status or affiliation.

The court of appeals was incorrect when it stated that "there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language." (Pet. App. 27a) (emphasis

18. *See, e.g., Alcorn County v. U.S. Interstate Supplies*, 731 F.2d 1160, 1167 (5th Cir. 1984); *Sutliff v. Donovan Companies*, 727 F.2d 648, 654 (7th Cir. 1984); *Owl Construction Co. v. Ronald Adams Contractor*, 727 F.2d 540, 542 (5th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3098 (U.S. June 11, 1984) (No. 83-2042); *Bunker Ramo Corp. v. United Business Forms*, 713 F.2d 1272, 1287 n.6 (7th Cir. 1983); *Schacht v. Brown*, 711 F.2d 1343, 1356 (7th Cir. 1983), *cert. denied sub nom. Arthur Anderson Co. v. Schacht*, 104 S. Ct. 508, 509 (1983); *Bennett v. Berg*, 685 F.2d 1053, 1063 (8th Cir. 1982), *aff'd*, 710 F.2d 1361 (8th Cir. 1983) *(en banc), cert. denied sub nom. Prudential Ins. Co. v. Bennett*, 104 S. Ct. 527 (1984). This Court, too, has refused to limit other federal statutes which, like RICO, were passed to deal with aspects of organized crime. *See, e.g., United States v. Culbert*, 435 U.S. 371, 374 (1978) (18 U.S.C. § 1951 (1946); extortion); *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966) (18 U.S.C. § 1953 (1961); lottery tickets).

in original). On the contrary, the legislative history indicates that Congress was well aware of the expansiveness of RICO's application,[19] but was adamant that the fight against organized crime not be impeded by an overly narrow definition of actionable conduct, or standing requirements.

RICO legislation was first introduced in 1967 in both Houses of Congress. The bills were studied by the American Bar Association, which issued a report in 1969. The ABA endorsed the concepts of the bills, but recommended these concepts be drafted outside the antitrust statutes, so that they might have a broader impact. The report expressed particular concern that use of the antitrust laws would create,

> inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. *Such a private litigant*

19. As Representative Mikva noted in House debate,

> My objection to the bill in toto is whatever its motives to begin with, we will end up with cases involving all kinds of things not intended to be covered, and a potpourri of language by which you can parade all kind of horribles of overreach . . . under the definition if five or more of [my colleagues] engage in . . . a game of poker and it lasts past midnight . . . thus continuing for a period of two days, then [they] have been running an organized gambling business and [they] can get 20 years, and the Federal Government can grab off the pot besides.

116 Cong. Rec. at 35,204 ('970).

Similar objections were voiced by civil liberties groups, fearing overbroad application. *See Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, before the Subcommittee on Criminal Laws and Procedure of the Senate Conmittee on the Judiciary,* 91st Cong., 1st Sess. 475 (1969).

> *would have to contend with a body of precedent — appropriate in a purely antitrust context — setting strict requirements on questions such as "standing to sue" and "proximate cause."*

115 Cong. Rec. 6994, 6995 (1969) (emphasis added). The ABA's recommendation that RICO legislation be separated from the antitrust laws was, of course, adopted, as the court of appeals acknowledges in its opinion (Pet. App. 14a). Accordingly, any suggestion that RICO actions be limited by antitrust-type limitations is anomalous to the very considerations that led to originally separating RICO from the antitrust statutes.

In Senate hearings in 1969, the American Civil Liberties Union objected to the breadth of RICO, commenting that it would be "applicable in areas far removed from that which we traditionally define as organized crime." *Measures Relating to Organized Crime: Hearings on S. 30, S. 994 . . . Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 91st Cong., 1st Sess. 475 (1969). It recommended that RICO be redrafted to "confine its reach to [the] limited aim" of restricting illegitimate investment. *Id.* In addition, Senators Philip A. Hart and Edward M. Kennedy filed individual reports on S. 30, which reflected the view of the ACLU, expressing concern that "the reach of [the] . . . bill . . . [went] beyond organized criminal activity." S. Rep. No. 617, 91st Cong., 1st Sess. 215 (1969). The Senators thought that if RICO were amended "to restrict its scope solely to organized criminal activity," it would contribute "important and useful means of eradicating organized crime." *Id.*

In addition, at the House hearings on Title IX, the Association of the Bar of the City of New York objected to the scope of the bill as reaching beyond what has traditionally been considered "organized crime." 91st Cong., 2d Sess. 294 (1970). Senator

McClellan, one of the bill's principal sponsors, responded that such a concern "confuses the occasion for reexamining an aspect of our system of criminal justice with the proper scope of any new principle or lesson derived from that reexamination." 116 Cong. Rec. 18,913 (1970). Senator McClellan further observed that the predicate offenses "are characteristic of organized crime. [They] lend themselves to organized commercial exploitation . . . *It is impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well.*" 116 Cong. Rec. at 18,940 (emphasis added). Senator McClellan also observed, "Of course, it is true that Title IX will have some application to individuals who are not themselves members of La Cosa Nostra or otherwise engaged in organized crime. However, that is not a reason to cut back its scope . . . ." 116 Cong. Rec. at 18,945.[20]

Congressman Biaggi proposed an amendment that sought to limit the application of RICO to Mafia and La Cosa Nostra organizations. 116 Cong. Rec. at 35,343. The amendment was vigorously attacked on constitutional grounds. House Judiciary Chairman Celler objected that such terms were "imprecise, uncertain and unclear," 116 Cong. Rec. at 35,343, and that mere membership in an organization should not be punished. 116 Cong. Rec. at 35,343-44. Congressman Poff, a sponsor of the bill, objected that such an amendment might violate this Court's rulings that struck down statutes which created status offenses, such as *Scales v. United States,* 367 U.S. 203 (1961), and *Robinson v.*

20. Later, in a law review article, Senator McClellan noted that "the Senate report does not claim . . . that the listed offenses are committed *primarily* by members of organized crime, only that these offenses are characteristic of organized crime." McClellan, *The Organized Crime Act or Its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame L. Rev. 55, 142 (1970).

California, 370 U.S. 660 (1962). 116 Cong. Rec. at 35,344. Congressman Poff also defended the broad reach of the act by noting,

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime — as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344. Earlier, Congressman Poff responded to critics by stating:

> Precedents as contained in numerous court decisions were reviewed and weighed — and every effort was made to produce a strong and effective tool with which to combat organized crime — and at the same time deal fairly with *all* who might be affected by this legislation — whether part of the crime syndicate or not.

116 Cong. Rec. at 35,205 (1970) (emphasis added). The amendment was rejected by Congress. 116 Cong. Rec. at 35,346.

Also during the House debates, it should be noted, Congressmen William F. Ryan, John Conyers, Jr., and Abner J. Mikva, like Senators Hart and Kennedy, objected to RICO as it was "a tool to be employed for all." H. R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970). They noted that it did not "make [a] discrete segregation of mobsters"; and the treble damage action "provide[d] invitation for disgruntled and malicious competitors

to harass innocent businessmen engaged in interstate commerce." *Id.* Finally, their plea that RICO "should not be adopted," *Id.* at 189, of course, was not accepted, and RICO became law.

What must be concluded from the legislative history is that if a "mobster"-type or "organized crime" type or "racketeering" injury limitation were read into the statute, it would be an amendment that the elected representatives specifically declined to adopt.

C. "Mobster"-type injury requirement — an unsound judicial engraftment.

In considering RICO, Congress recognized that fraud is a pervasive problem throughout our society, *see* Statement of Findings and Purpose, Organized Crime Control Act of 1970, 84 Stat. 922-23, *Civil Action, supra,* p. 12, at 245-48, which causes billions of dollars in economic loss each year.[21] It has been observed that "[w]hite collar crime is a low visibility, high impact factor in our society . . . Like common crime, [it] can have a serious influence on the social fabric, and on the

21. The most comprehensive study of fraud done in recent years was published in 1974 under the auspices of the Chamber of Commerce of the United States. The Chamber estimated the direct economic cost of fraud as follows:

		Billions of Dollars
1.	Bankruptcy Fraud	.08
2.	Bribery, Kickbacks and Payoffs	3.00
3.	Consumer Fraud	21.00
4.	Embezzlement	7.00
5.	Insurance Fraud	2.00
6.	Receiving Stolen Property	3.50
7.	Securities Theft and Fraud	4.00
8.	Credit Card and Check Fraud	1.10
9.	Computer Related Fraud	.10
	Total	41.78

(Cont'd)

freedom of commercial and interpersonal transactions." H. Edelhertz, *The Nature, Impact, and Prosecution of White Collar Crime* 6-7 (1970).

Although constrained by *Sedima,* Circuit Judge Pra. observed, albeit somewhat futilely:

> It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, constitutes a "pattern of racketeering activity". And when that pattern is used to conduct the affairs of an "enterprise", Congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the defendant's conduct.

Furman, 741 F.2d at 529.

Congress further acknowledged that existing state and federal law was not capable of dealing with this problem. *See United States v. Turkette,* 452 U.S. at 586. "Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds

(Cont'd)

Given the inflation rate since 1974, it would not be unreasonable to estimate a figure twice that today. *See Hearings on the Department of State, Justice and Commerce, the Judiciary, and Related Agencies, Subcommittee on Appropriations, House of Representatives,* 96th Cong. 2d Sess. 17 (1980) (testimony of FBI Director William H. Webster) ($44 to 100 billion). There can be no more significant issue of government than that its contract procurements process be free from fraud.

actionable in federal treble damage proceedings — the price of eliminating all possible loopholes." *Sutliff v. Donovan Companies,* 727 F.2d at 654.

In order to deter and help eliminate fraud from interstate commerce, Congress included in its definition of predicate acts of racketeering activity not only criminal activity which had formerly been "within the police power of the State," thereby essentially federalizing certain state crimes *Turkette,* 452 U.S. at 586-87 (citing legislative history), but also common federal crimes such as mail fraud and wire fraud. Congress was well advised that in doing that, it was altering the balance between federal and state laws, elevating "garden variety" common law fraud claims to the status of federal offenses, and subjecting violators to enhanced criminal penalties and severe civil remedies. *Id.*

"In response to suggestions that the statute be more narrowly tailored to prevent unexpected applications, Congress clearly preferred breadth to precision." *Haroco,* 747 F.2d at 398. Since Congress had the power to do this, "the courts are without authority to restrict the application of the statute." *Turkette,* 452 U.S. at 586-87.

CONCLUSION

The judgement of the court of appeals affirming the dismissal of the amended complaint should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1984

No. 84-648

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 84-822

AMERICAN NATIONAL BANK AND TRUST CO. OF CHICAGO, et al.,

Petitioner,

v.

HAROCO, INC., et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Interest of Amicus*

In recent years, governments on all levels—federal, state and local—have increasingly recognized the remedial value of civil sanctions to combat pervasive fraud committed against the public. No longer satisfied with the mere imposition of criminal penalties against wrong-doers, municipal entities are now seeking to return the ill-gotten gains of those who corrupt our institutions to the public treasury. Toward that end, Amicus, County of Suffolk, has initiated two civil lawsuits pursuant to, *inter alia*, the Racketeer Influenced and Corrupt Organizations Act of the Organized Crime Control Act of 1970 (RICO) [18 U.S.C. 1961, et seq.]. In *County of Suffolk* v. *Estate of Walsh, et al.*, 81 Civ. 257 (E.D.N.Y.; filed January 27, 1981) [filed sub nom., *County of Suffolk* v. *Walsh, et al.*], Amicus sought damages and recision of certain engineering and construction contracts in a 260 million dollar fraud action which was based on a pattern of corruption and kickbacks in the planning and construction of a billion dollar public works project known as the Suffolk County Southwest Sewer District. Similarly, in *County of Suffolk* v. *Tempera, et al.*, 82 Civ. 2194 (E.D.N.Y.; filed July 26, 1982), Amicus sought approximately four million dollars in damages and recision of certain educational and training contracts as well as recision of certain salary monies paid to a local government official in connection with a pattern of bribery and kickbacks in the award and execution of public contracts funded by the United States Department of Labor.

In these cases, Suffolk County, a municipal corporation and political subdivision of the State of New York, located on the eastern two-thirds of Long Island, New York, with a

* The filing of this brief is pursuant to Rule 36(4) of the Court.

population of approximately 1.4 million persons, has attempted to both relieve the financial burden on taxpayers and in its own behalf and as fiduciary for the United States of America, recoup monies illegally obtained by the wrongful conduct alleged in these suites.

The broad policy question presented in both cases on review herein is the scope and application of the civil RICO statute. As we outline in our argument, the majority opinion in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-648), has, with virtually no statutory or case law precedent, improvidently narrowed the intended reach of RICO by engrafting a prior conviction prerequisite to civil suit under the statute. This decision constitutes an unwarranted restriction on the ability of local and state government to recoup illegally obtained taxpayers' money. Additionally, the *Sedima* majority's engrafting of a so-called "racketeering injury" as an element which the prospective civil RICO plaintiff must prove was an inappropriate enactment of judicial legislation which was correctly rejected in *Sedima's* companion case, before the Court, *Harco, Inc.* v. *American National Bank and Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), cert. granted, —— U.S. —— (1985) (No. 84-822).

Summary of Argument

The scope and purpose of the provisions of RICO and in particular, its civil provisions, 18 U.S.C. 1964(c) is clear—to strip those who engage in racketeering activity of their ill-gotten fruits and thus, provide a remedy to

those innocent parties harmed by such illicit conduct. See, *United States* v. *Turkette*, 452 U.S. 576, 586-587 (1981); see also, *Russello* v. *United States*, —— U.S. ——, ——-——, 104 S.Ct. 296, 302-303 (1983). Notwithstanding the majority's holding in *Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, No. 84-648, the legislative history and developing case law under this provision demonstrate no requirement of a prior criminal conviction as a prerequisite to suit. Similarly, any judicial attempt to legislate a requirement that plaintiffs in such suit prove a "racketeering injury" as an element of proof precedent to recovery should be rejected. Compare, *Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago*, No. 84-648 with *Sedima, supra.*

ARGUMENT

The remedial provisions of civil RICO [18 U.S.C. 1964(c)] should be liberally construed to reject a requirement of proof of a prior conviction and so-called "racketeering injury" as a prerequisite to suit.

A. The Previous Conviction Requirement

The remedy provided in 18 U.S.C. 1964(c) must, of course, be viewed in light of the statute's legislative history and case law construction. On this basis, Amicus urges a previous criminal conviction plainly is *not* a prerequisite to suit under RICO.

18 U.S.C. §1964(c) provides:

> "Any person injured in his business or property by reason of *a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages

he sustains and the cost for the suit, including a reasonable attorney's fee." (emphasis added).

Analyzing RICO's "language" [*United States* v. *Turkette,* 452 U.S. 576, 580 (1981)] and "literal meaning of the words employed," [*Flora* v. *United States,* 357 U.S. 63, 65 (1958)], Section 1964(c) refers to a "violation" of the standards of Section 1962, and *not* to the criminal penalties of Section 1963. Section 1963 states that acts in violation of it are "unlawful," not criminal.[1] Criminal and civil sanctions are supplied to violations of Section 1962 by Section 1963 (criminal) and Section 1964 (civil).

Accordingly, Amicus respectfully maintains that any construction of RICO which requires a prior "RICO conviction" as defined in 18 U.S.C. 1962 is an incorrect narrowing of the statute's scope and purpose. Simply stated, there is no reason to "depart . . . from and limit . . . the statutory language." *United States* v. *Turkette,* 452 U.S. 576, 581 (1981) (apropos of scope of "enterprise"). Thus, the broad construction suggested by petitioner Sedima with respect to the prior conviction question "is neither absurd nor surprising." *Id.* at 537.[2]

1. Contrary to the *Sedima* majority's inference [741 F.2d at 501-502] civil RICO is *not* a criminal statute in any sense. It does not make criminal, conduct that before its enactment was innocent, since its application depends on the existence of "racketeering activity" that violates an independent criminal statute. Its standards of "unlawful" conduct are in fact sanctioned by criminal *and* civil remedies. RICO is, in short, a "remedial" statute. 84 Stat. 947 (1970) ("remedial purposes" warrant "liberal" construction). See, *United States* v. *Frumento,* 563 F.2d 1083, 1090-1091 (3d Cir. 1977), cert. denied, 434 U.S. 1072 (1978); see also, e.g., *State Farm Fire & Cas. Co.* v. *Caton,* 540 F.Supp. 673, 675 (N.D.Ind. 1982).

2. Indeed, any other construction of Section 1964 flies, not only i nthe face of the liberal construction directive noted supra at fn. 1, but also RICO's explicit statement of findings and purpose. 84 Stat.

(footnote continued on next page)

Congress intended that civil litigants ("persons") be given a cause of action for relief in cases in which a defendant, through an "*indictable*" or "*chargeable*" "pattern of racketeering" [18 U.S.C. 1961(1)(a) and (b) (emphasis supplied)] had caused injury to a plaintiff. Simply stated, these words "mean just what they say" [*Sedima,* 741 F.2d at 504 (Cardimone, J. dissenting)]; there is no requirement that either a United States Attorney or a state prosecutor have obtained a conviction as a threshold requirement to suit under this statute.

Thus, the narrow holding of *Sedima* would, at the very least, be wholly inconsistent with the case law as it has developed since RICO's enactment in 1970. For example, in *United States* v. *Cappetto,* 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975), one of the first reported civil RICO cases, the Government began an injunctive action against the defendant under Section 1964 (a) and (b). Section 1964(a) grants equity jurisdiction to federal courts to prevent and restrain "violations of Section 1962." The Government in Section 1964(b) is explicitly

922-23 ("illegal use of . . . fraud" "enhanced sanctions and new remedies"). Thus, if this Court accepts such a construction on Section 1964 cases, the class of injured persons entitled to sue even outside those in the public sector as noted, *infra,* would be sharply curtailed. In following the antitrust model by providing a cause of action for injured persons, Congress "created . . . the civil suit under Section . . . [1964] precisely for the purpose of encouraging *private* challenges to violation." *Reiter* v. *Sonotone Corp.,* 442 U.S. 330, 344 (1979) (emphasis in original) (apropos of section 4 of the Clayton Act). "Private suits" were thought to "provide a significant *supplement* to the limited resources available to the Department of Justice . . ." (emphasis added). *Id.* See, *United States* v. *Borden Co.,* 347 U.S. 514, 518 (1954) (private suits under section 4 "designated to be *cumulative,* not *mutually exclusive*") (emphasis added). A narrow construction of Section 1964 would undermine those "salutary purposes." *United States* v. *Parness,* 503 F.2d 430, 439 (2d Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (apropos of "enterprise").

authorized to "institute proceedings" under Section 1964 (a). No prior criminal conviction had been obtained. The court observed:

> "[A]cts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enforce those acts is not rendered criminal in character by the fact that the acts are also punishable as crimes . . . The relief authorized by . . . [Section 1964]." 502 F.2d at 1357.

Similarly, in *Farmers Bank of State of Delaware* v. *Bell Mortgage, Corp.*, 452 F.Supp. 1278 (D.C.Del. 1978), a private civil damage action was brought under Section 1964. The defendant objected that he had "not [been] convicted . . ." 452 F.Supp. at 1279. The court held:

> "Section 1964(c) . . . does not condition . . . [a] cause of action in any way upon a previous conviction under the criminal provisions of the statute. It is only necessary that the plaintiff provide elements of the Act by a preponderance of the evidence in order to be awarded damages in a civil action." 452 F.Supp. at 1280.

Interestingly enough, prior to *Sedima,* the Second Circuit at least in dicta held that criminal convictions were not necessary [*Moss* v. *Morgan Stanley, Inc.*, 719 F.2d 5, 19, fn. 15 (2d Cir. 1983), cert. denied, *sub nom., Moss* v. *Newman,* —— U.S. ——, 104 S.Ct. 1280 (1984)], which determination was specifically reached as holding in the Sixth and Seventh Circuits. *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1287 (7th Cir. 1983), *USACO Coal Co.* v. *Carbomin Energy, Inc.*, 689 F.2d 94,

95 fn. 1 (6th Cir. 1982); see also, *Bennett* v. *Berg,* 685 F.2d 1053, 1063-1064 (8th Cir. 1982), aff'd 710 F.2d 1361 (8th Cir. 1983) (en banc); *Owl Construction Co., Inc.* v. *Ronald Adams Contractor, Inc.*, 727 F.2d 540, 542 (5th Cir. 1984); cf., *Alexander Grant and Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413, fn. 11 (8th Cir. 1984) (issue not reached). Indeed, the *Sedima* majority conceded that virtually every prior case to have definitively ruled on the question held that a previous criminal "RICO" conviction was not necessary as a pre-condition to the filing of an efficacious civil RICO suit. *Sedima,* 741 F.2d at 496-498 and cases cited at fns. 42-43; see also, Cardimone, J., dissenting in *Sedima* at 504-505); see also, *Bennett* v. *E. F. Hutton Co., Inc.*, 597 F.Supp. 1547, 1556-1558 (N.D.Ohio 1984) (rejecting *Sedima*).

The *Sedima* majority's announcement of the previous conviction requirement would seem to have been based, at least in part, on a reaction to a perceived flood of so-called "garden variety" civil-RICO lawsuits [see, *Sedima,* 741 F.2d at 408, 503]. We suggest that such a theory inappropriately serves to judicially repeal civil RICO in many cases contrary to strong Congressional intent[3] and thus, in essence "throw the baby out with the bathwater."[4]

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3. See analysis of civil RICO's legislative history contained in McClellan, *The Organized Crime Control Act (S.30) or its Critics: Which Threatens Civil Liberties?,* 46 Notre Dame L.Rev. 55 (1970); Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts, Criminal and Civil Remedies,* 53 Temple L.Rev. 1009, 1014-1015 (1980); see also, Blakey, *The Civil RICO Fraud Action in Context: Reflections on Bennett* v. *Berg,* 58 Notre Dame L.Rev. 237, 249-250 (1982).

4. We note that there, in fact, are predicate criminal convictions underlying the racketeering activity complained of in both civil RICO cases filed by the Amicus Suffolk County in the civil RICO cases it is a party litigant [*United States* v. *Walsh,* 700 F.2d 846 (2d Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 984 (1983); and *People* v.

(footnote continued on next page)

Amicus, along with various other municipalities and state governments, suing as "persons" under 18 U.S.C. 1964(c), has sought to utilize the civil RICO's provisions in the civil forum for the public interest [see e.g., *United States* v. *Sells Engineering, Inc.*, —— U.S. ——, - ——, 103 S.Ct. 3133, 3161-3162 (1983), (Burger, C.J., dissenting); *Matter of District Attorney of Suffolk County*, 58 N.Y.2d 436, 445 (1983)] to recover ill-gotten monies to the taxpayers and thus strip violators of the fruits of their criminal activities. See, e.g., *Alcorn County* v. *United States Interstate Supplies, Inc.*, 731 F.2d 1160 (5th Cir. 1984); *State of New York* v. *O'Hara*, 595 F.Supp. 1101 (W.D.N.Y. 1984); *Gerace* v. *Utica Veal Co.*, 580 F.Supp. 1465 (N.D.N.Y. 1984); *County of Cook* v. *Midcon Corp.*, 574 F.Supp. 902 (N.D.Ill. 1983); *County of Cook* v. *Lynch*, 560 F.Supp. 136 (N.D.Ill. 1982); *Municipality of Anchorage* v. *Hitachi Cable, Ltd.*, 547 F.Supp. 633 (D.Alaska 1982); *Maryland* v. *Buzz Berg Wrecking Co.*, 496 F.Supp. 245 (D.Md. 1980); *City of New York* v. *Arnmart Wholesale Beer Distributors, Inc.*, 83 Civ. 9263 (S.D.N.Y. 1983); *City of New York* v. *Bandolene Fuels, Inc.*, 81 Civ. 1240 (E.D.N.Y. 1981); *City of Milwaukee* v. *Hansen*, Civ. No. 77-246 (E.D.Wisc. 1981); see also, Shaw, *Use of RICO's Civil Remedies by State, Local*

Tempera, 94 A.D.2d 987 (2d Dep't 1983)]. Nonetheless, in *County of Suffolk* v. *Estate of Walsh*, supra, the District Court has stayed all proceedings pending the resolution of the cases, *sub judice* in this Court. However, "limit[ing] private RICO" because there are no "prosecutorial guidelines" as in criminal RICO [*Sedima, supra* at 497], should not be a function of our appellate courts when Congress has clearly spoken to the contrary. Such a restriction with absolutely no guidance as to its ultimate scope [see, *Sedima, supra* at 503], would, with virtually no precedent, precondition all civil RICO suits, on prosecutorial discretion. This in turn is a function of a commitment of limited resources in cases where a government's priorities and responsibilities may necessarily differ in either the criminal or civil forum.

Governments, New York Law Journal, June 14, 1982 at pp. 1 and 3.

Thus, while we are certainly not persuaded that in at least public sector litigation, as one court has noted in general, RICO has "created a runaway treble damage bonanza for the already excessively litigious" [*Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), cert. denied, —— U.S. ——, 104 S.Ct. 508 (1983); see also, *Sedima, supra*, at 786], where Congress has spoken in "clear and unambiguous terms" on the matter [cf., *Furman* v. *Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984), application for cert. pending, No. 84-604], statutory enactment by bald judicial fiat to narrow civil RICO on this question is plainly inappropriate.

As Judge Cardimone [dissenting in *Sedima*, 741 F.2d at 505] succinctly observed, "the simple explanation for [the] resounding rejection of any prior conviction requirement," [in all previous cases] is that "*it does not appear in the statute*" (emphasis supplied).

It is for this reason, we respectfully maintain, that only days after *Sedima*, a different Second Circuit panel suggested that *Sedima* had improvidently and without authority, restricted the plain meaning and intent of civil RICO as enacted by Congress. *Furman* v. *Cirrito*, 741 F.2d at 531-532; see, Note, Civil RICO: *The Temptation and Impropriety of Judicial Restrictions*, 95 Harv.L.Rev. 1101, 1118-1121 (1982); Strafer, Massimi and Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling"*, 19 American Criminal L.Rev. 655 (1982); see also, *Bennett* v. *Berg*, 685 F.2d at 1064 ["it is beyond our authority to restrict the reach of the statute"].

B. The "Racketeering Injury" Requirement

The "racketeering injury" requirement promulgated in *Sedima* similarly has no basis in the language of the statute or in its legislative history. Further, this requirement, especially as interpreted by the Second Circuit in the companion case of *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) [application for cert. pending No. 84-657], would have a negative impact on future civil RICO actions,[5] simply because this standing requirement is incapable of any meaningful definition which does not re-introduce the discredited organized crime nexus requirement through the back door.

While the *Sedima* court suggested that the language of §1964(c) is ambiguous, and therefore, open to judicial interpretation [741 F.2d at 486-488], another Second Circuit panel only two days later in *Furman* v. *Cirrito,* 741 F.2d 524 (2d Cir. 1984), found that it was not:

> "To us the language of §1964(c) is clear. It contains no requirement for a 'racketeering enterprise injury;' nor does it limit the protected injury to one sustained 'by reason of' the racketeering enterprise; it grants civil relief for 'injury,' which logically includes any injury, 'by reason of a violation of §1962.' " 741 F.2d at 528.

Indeed, as we have previously argued, it is clear that the *Sedima* court based its finding of §1964(c)'s ambiguity on nothing more than it's own judicial unhappiness with the

5. We note that in both actions filed by Amicus County of Suffolk, long before *Sedima,* injury due to racketeering activities of the nature suggested in that case was in fact pleaded. However, aside from whether or not civil RICO should properly have such a standing rule, as discussed *infra, Sedima* has outlined no criteria for evaluating such a requirement.

impact of the statute, as written, upon alleged fraud involving "respected and legitimate enterprises." 741 F.2d at 487.

With respect to the legislative history of civil RICO concerning this issue, the *Sedima* court suggested that there is nothing but "clanging silence." But see, Amicus's brief, *supra,* fn. 3. The central problem involved in the "racketeering injury" requirement, however, lies in defining and applying the term. As the Seventh Circuit in *Haroco* has observed, those courts which have sought to impose this requirement have been unable to formulate a meaningful definition. 747 F.2d at 387-389. Indeed, the *Sedima* court has done little more than state that a racketeering injury is something more than the proximate results of the RICO predicate acts, and must be caused by activity of a kind which RICO was designed to deter. 741 F.2d at 495-496. To make matters even more clouded, in the *Sedima's* companion case, decided one day later, *Bankers Trust* v. *Rhoades,* 741 F.2d 511 (2d Cir. 1984) (application for cert. pending, No. 84-657), the Second Circuit required that this "something more" result from all of the essential elements of the RICO violation. 741 F.2d at 515-517.

The Second Circuit's definition of "racketeering injury" thus offers no practical guidance to the potential governmental or private plaintiff, or to courts faced with motions for the dismissal of otherwise meritorious civil RICO actions. Litigants are left with little more than an "I know it when I see it" standard [see, *Haroco,* 747 F.2d at 389, citing *Williamette Savings & Loan* v. *Blake & Neal Finance Co.,* 577 F.Supp. 1415, 1430 (D.Ore. 1984); *Waste Recovery Corp.* v. *Mahler,* 566 F.Supp. 1466, 1468-1469 (S.D.N.Y.

1983)], and the implication in *Sedima* is that the court will know and sustain civil RICO actions only when La Cosa Nostra, the Mafia or similar organized crime groups are involved. Thus, the "racketeering injury" requirement has brought RICO jurisprudence full circle to the "organized crime nexus" requirement rejected, as noted in *Haroco,* 747 F.2d at 394-395, in *Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1982) and those cases cited in *Sedima, supra* at fns. 31 and 32.

The potential damage caused by the "racketeering injury" requirement extends even to those cases in which "mobsters" are involved. There is nothing magical about the involvement of "mobsters" which will conjure up the additional consequential injuries suggested as requisite to a valid civil RICO suit by *Sedima* and *Bankers Trust.* Even in cases in which there has been a successful criminal RICO prosecution of a "mobster," under the *Sedima/ Bankers Trust rule,* argument will be made that the subsequent civil RICO action should fail, if, as is often the case, the only injuries are those caused by the predicate acts. Thus, the *Sedima/Bankers Trust* standard does not even serve to focus civil liability upon those whom it identifies are the prime targets of RICO and thus, does not fulfill RICO's civil objectives as a statute which was "deliberately" drafted to be "extraordinarily broad." *Haroco,* 747 F.2d at 390.

It is clear from the above that reversal of *Sedima* and affirmance of *Haroco* is appropriate, both to avoid violence to the statutory language and to preserve the civil remedy which Congress intended to give to "persons," and in particular, governmental institutions, who have been fraudulently victimized by organized patterns of criminality.

Conclusion

Civil RICO [18 U.S.C. §1964(c)] should be liberally construed as Congress intended to permit viable causes of action without previous criminal convictions and without pleading and proof of "racketeering injury."

Dated: February 15, 1985

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
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SEDIMA, S.P.R.L.,
Petitioner,
- v. -
IMREX COMPANY, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 84-648

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

SEDIMA, S.P.R.L.,
Petitioner,
- v. -
IMREX COMPANY, INC., et al.,
Respondents.

BRIEF OF THE CITIES OF NEW YORK, CHICAGO, AND PHILADELPHIA, AMICI CURIAE

INTEREST OF AMICI CURIAE

The Cities of New York, Chicago and Philadelphia ("the Cities") submit this amici curiae brief in support of the positions of the petitioner in Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (1984). This decision threatens the vitality and effectiveness of a statutory remedy used by the Cities and other local or state governments to combat systematic fraud and governmental corruption.

Local law charges each of the Cities with the

responsibility of representing and protecting the public interest and the rights of its citizens. Each of the Cities is also charged with the institutional responsibility of protecting its capability for delivering honest, efficient, impartial and effective governmental services to all its citizens. See New York City Charter § 394; 1970 Illinois Constitution, Art. VII, § 6; City of Philadelphia Home Rule Charter § 4-400.

In fulfilling its obligations, each of the Cities, as well as other localities, must confront the persistent challenges and dangers, as well as the corrupting influence, posed by systematic criminal frauds. Tax evasion or public contractor frauds cause massive economic loss to cities. Bribery and kickback schemes injure the public fisc and impair the integrity of government. Public benefits programs are repeatedly targeted by malefactors who defraud the government and the intended beneficiaries. Organized drug trafficking and arson for profit schemes create extraordinary demands on police and other governmental services and diminish

the quality of life in cities.

These criminal activities are often accomplished through sophisticated means, by criminal enterprises which systematically commit multiple criminal acts. Ordinary civil and criminal remedies available to penalize specific criminal acts and offer recompense to cities are insufficient to eradicate the widespread problems caused by the systematic misconduct of criminal enterprises. Extraordinary remedies are needed.

The Cities have found that the civil remedy provision in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), is an effective weapon for deterring these various criminal schemes and protecting the public interest, the public fisc and the institutions of local government.* Specifically, the Cities have

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* The Cities' view is shared by commentators. See Note, Government Corruption and Civil RICO: Providing Compensation for Intangible Losses, 58 N.Y.U. L. Rev. 1530 (1983); Tannenbaum & Molo, State and Local Governments' Use of the Treble Damages Remedy Under Civil RICO: A Means of Redressing the Economic Effects of Unlawful Conduct, 35 Baylor L. Rev. 1 (1983).

employed the civil remedy provision in RICO to attack fraudulent tax evasion, bribery and illegal bidding schemes.* In City of New York v. Arnmart

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* Civil RICO actions have also been employed by or on behalf of state or other local governments to recover the loss flowing from complex and far-reaching frauds, often accompanied by bribery or some other form of corruption. See New York v. O'Hara, 83 Civ. 1440 (W.D.N.Y., filed December 21, 1983) (bribery and overcharges in connection with toxic waste disposal contract); County of Suffolk v. Walsh, 81 Civ. 0257 (E.D.N.Y., filed Jan. 27, 1981) (bribery and bid rigging in connection with sewer construction project); Moore v. Margiotta, 83 Civ. 2036 (E.D.N.Y., filed May 19, 1983) (taxpayers' civil RICO action arising from political slush fund payoffs, kickbacks, and money laundering scheme); Alcorn County v. U.S. Interstate Supplies Inc., 731 F.2d 1160 (5th Cir. 1984) (bribery and fraudulent billing by office supply company); Gerace v. Utica Veal Co., 580 F.Supp. 1465 (N.D.N.Y. 1984) (fraudulent underreporting by stockyard of weight and grade of ranchers' livestock, causing higher reimbursement payments to ranchers by state); County of Cook v. Lynch, 560 F.Supp. 136 (N.D. Ill. 1982) (bribery in return for real estate tax assessment reductions); Muncipality of Anchorage v. Hitachi Cable, Ltd., 547 F.Supp. 533 (D. Alaska 1982) (bribery and bid rigging in connection with telephone cable contracts); Maryland v. Buzz Berg Wrecking Co., 496 F.Supp. 245 (D.Md. 1980) (bid rigging and bribery in connection with demolition work for urban renewal project).

Wholesale Beer Distributors, Inc., 83 Civ. 9263 (S.D.N.Y., filed Dec. 21, 1983), New York sued eleven beer distributors and their principal officers for their participation in an elaborate series of schemes — described in greater detail, infra — to evade the City's beer excise and general corporation taxes. In City of New York v. Liberman, Index No. 40339/85 (Supreme Court of New York, filed February 8, 1985), the City of New York sued its former chief lease negotiator due to his participation in a scheme to defraud the City in connection with the City's leases of various properties. In City of New York v. Sitzer, 81 Civ. 7116 (S.D.N.Y., settled March 12, 1984), New York sued the operators of a group of massage parlors who systematically laundered their revenues, committed bribery and evaded City taxes. In City of New York v. Bandolene Fuels, Inc., 81 Civ. 1240 (E.D.N.Y., filed April 24, 1981), New York sued a fuel oil company and its principal officer for the

damages flowing from a fraudulent bidding and overbilling scheme. In City of Chicago v. North Austin Revitalization Corp., No. 85C-0441 (N.D. Ill., filed Jan. 18, 1985), the City of Chicago sued one of its former attorneys for using his position in the City Law Department to allow a corporation in which he was an officer and employee to reap excess profits from participation in a public housing program which funded the purchase, rehabititation and sale of abandoned buildings. In City of Philadelphia v. Modern Transportation, Inc., 84 Civ. 2052 (E.D.Pa., settled Feb. 13, 1985), the City of Philadelphia sued eleven corporations due to their participation in an intricate scheme to defraud the City in connection with sludge removal contracts. In addition, the Cities have explored the possibility of civil RICO actions to recover the losses arising from extraordinary demands on local governmental services and diminution of the quality of life caused by the systematic misconduct of criminal

enterprises.*

SUMMARY OF ARGUMENT

The Second Circuit departs from principled analysis of the RICO statute in creating the prior conviction and racketeering injury requirements in Sedima.** There is no basis in the language or the policy of the statute for the prior conviction and racketeering injury requirements created by the Second Circuit. The Second Circuit read into the statute requirements which simply do not appear there.

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* Compare City of Milwaukee v. Hansen, Civ. No. 77-246, slip op. at 3-4 (E.D. Wis. Jan. 13, 1981) (arsonists liable for treble the cost of fighting fires).

** The Second Circuit followed this inappropriate course apparently because of its dissatisfaction that RICO has "led to claims against such respected 'enterprises' as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch." Sedima, supra, 741 F.2d at 487.

POINT I

THE PRIOR CONVICTION REQUIREMENT SHOULD BE REJECTED.

The prior conviction requirement created in Sedima, supra, 741 F.2d at 496-504, has no basis in the RICO statute. There is no ambiguity in the statute — it plainly and clearly does not require prior convictions. In light of this clear language, virtually every court which has considered the issue has rejected the argument that prior convictions are required.* The Second Circuit's criticism in

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* See Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983); USACO Coal Corp. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982); United States v. Cappetto, 502 F.2d 1351, 1356-57 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1975); In re Longhorn Securities Litigation, 573 F.Supp. 255, 270-71 (W.D. Okla. 1983); Barker v. Underwriters at Lloyd's, London, 564 F.Supp. 352, 356 (E.D. Mich. 1983); Mauriber v. Shearson /American Express, Inc., 546 F.Supp. 391, 396 (S.D.N.Y. 1982); State Farm Fire & Cas. Co. v. Estate of Caton, 540 F.Supp. 673, 675-76 (N.D. Ind. 1982); Parnes v. Heinold Commodities, Inc., 487 F.Supp. 645, 646-47 (N.D. Ill. 1980); Farmers Bank v. Bell Mortgage Corp., 452 F.Supp. 1278, 1280 (D. Del. 1978). See also Moss v. Morgan Stanley, Inc., 719 F.2d 5, 19 n.15 (2d Cir. 1983), cert. denied, sub nom. Moss v. Newman, 104 S.Ct.
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Sedima, supra, 741 F.2d at 496-98, that these decisions are poorly reasoned because they contain little discussion of this argument, ignores the obvious explanation that little discussion is necessary — no requirement of prior convictions appears in the statute.

The analysis by which the Second Circuit imposed a prior conviction requirement in civil RICO actions is flawed. There is no ambiguity in the definition of the predicate acts as certain acts "indictable" under federal law, "chargeable" under state law, or constituting "offense[s]" under federal securities, bankruptcy or drug laws. See 18 U.S.C. § 1961(1). This language means only that the elements of these state or federal crimes are the elements of the predicate acts in a civil RICO

(footnote from previous page)
1280 (1984).

Only two known reported opinions uphold (in dicta) such a requirement. See Van Schaick v. Church of Scientology, 535 F.Supp. 1125, 1137 n.12 (D. Mass. 1982) and Kleiner v. First Nat'l Bank, 526 F.Supp. 1019, 1022 n.2 (N.D. Ga. 1981), overruled on other grounds, Morosani v. First Nat'l Bank, 703 F.2d 1220 (11th Cir. 1983).

action. There is nothing in the statutory language which requires a conviction for the predicate acts. Similarly, there is no ambiguity in the fact that the RICO civil remedy may only be invoked where a "violation" of RICO has occurred. See 18 U.S.C. § 1964(c). There is nothing in the word "violation" necessarily or even implicitly incorporating a prior conviction requirement.

This straightforward analysis of the language of the statute should be sufficient to require rejection of the prior conviction argument, since the RICO statute, like any statute, should be interpreted according to its plain meaning. Russello v. United States, 104 S. Ct. 296, 299 (1983); United States v. Turkette, 452 U.S. 576, 580 (1981). Only in a limited class of cases, where there is "clear evidence" of a contrary legislative intent, will this rule not be applied. United States v. Apfelbaum, 445 U.S. 115, 121 (1980).

There is no legislative history regarding a doctrine which Congress neither considered nor adopted as part of the statute. The Second Circuit

filled this void by stating a "plausible" view — its view — of the intent Congress would have had and of the language Congress would have used had it considered the issue. See Sedima, supra, 741 F.2d at 498, 500-01, 503.* The very least of the criticisms which may be made of this result-oriented analysis is that it most certainly is not "clear evidence" of a legislative intent inconsistent with the plain language of RICO — which contains no prior conviction requirement.**

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* The Second Circuit suggested that since the predicate acts "speak along criminal rather than civil lines," the civil RICO remedy applies only to conduct already determined to be criminal. See Sedima, supra, 741 F.2d at 499-501. This analysis ignored that "Congress may impose both a criminal and civil sanction in respect to the same act or omission," United States v. One Assortment of 89 Firearms, 52 U.S.L.W. 4228, 4231 (Feb. 22, 1984); United States v. Ward, 448 U.S. 242, 250 (1980), and create a statutory scheme in which either sanction may be pursued completely independently of the other.

** The Second Circuit justified its creation of a prior conviction requirement by its view that such a holding avoided the necessity of determining whether the constitutional protections of the criminal law are applicable in a civil RICO action. (footnote continues on next page)

The prior conviction requirement will bar many actions contemplated by Congress when it enacted the civil remedy provision in RICO. The prior conviction requirement makes local and state government civil RICO suits subject both to a prosecutor's prior exercise of discretion to

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(footnote from previous page)
See Sedima, supra, 741 F.2d at 500 n.49. This justification is flawed in two crucial respects. First, enhanced procedural protections, such as those available to criminal defendants, are not required in proceedings in connection with a statute expressly denominated as civil unless the statute is so punitive in purpose or effect as to negate the appropriateness of the "civil" label. See United States v. One Assortment of 89 Firearms, 52 U.S.L.W. 4228, 4230-31 (Feb. 22, 1984); United States v. Ward, 448 U.S. 242, 248-49 (1980). The civil treble damages remedy created in the RICO statute is primarily remedial and compensatory, as demonstrated by Judge Cardamone in his dissenting opinion in Sedima, supra, 741 F.2d at 506-08; therefore, civil RICO defendants have no constitutional entitlement to the enhanced procedural protections of the criminal law. Moreover, the Second Circuit's perceived need to avoid this question is simply inconsistent with the analysis of the Supreme Court in 89 Firearms, Ward, and other similar cases in which the Supreme Court has chosen not a course of "avoidance" through strained statutory construction, but instead has forthrightly determined whether or not the claimed constitutional procedural protections are applicable.

commence a criminal action, and to the prosecutor's prior success in the criminal action. Thus, the prior conviction requirement deprives local and state governments of independent use of an effective civil remedy against corruption, large-scale frauds and other broad-based criminal schemes.

It is unfortunately all too easy to chart the disastrous effect which the prior conviction requirement will have on meritorious civil RICO suits. For example, in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, eleven beer distributing companies evaded excise taxes on wholesale beer purchased in New York City by fraudulently representing sales of beer to be sales of soda; laundering beer sales through fictitious purchasers residing outside the City; engaging in off-the-books cash transactions; filing fraudulent tax returns; and failing to file tax returns. This is the kind of systematic criminal scheme which RICO was designed to eliminate. The City of New York decided to bring a civil RICO treble damages action since treble damages would be most effective as a

deterrent and as a means of recovering losses.* Five of the companies settled their liability with New York City. Because there were no prior convictions, however, the remaining perpetrators of these schemes will totally escape civil liability under RICO — if the prior conviction requirement created in Sedima is not overruled.

Similarly, the prior conviction requirement has created an artificial and anomalous obstacle to the City of New York's full employment of the civil remedy in RICO in City of New York v. Liberman, supra. In that case, New York City's former chief lease negotiator and a number of landlords were involved in a bribery scheme which defrauded New York City in connection with the lease of space for public agencies. The federal government decided to focus a criminal prosecution on Mr. Liberman, and

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* Referring a case to a criminal prosecutor does not guarantee that there will be a criminal prosecution, since the decision to do so is then within the prosecutor's discretion. Prosecutorial priorities may differ from a city's priorities, and prosecutorial resources are limited.

obtained a guilty plea from Mr. Liberman to a criminal RICO violation based on, inter alia, bribe receiving. The City of New York decided to target not only Mr. Liberman, but also his fellow wrongdoers — the landlords and various persons who acted as intermediaries to launder the payoffs —and sued all of them in state court under various common law theories less far-reaching and effective than RICO. The City of New York also included a civil RICO claim against Mr. Liberman in this action. But the landlords could not be sued under the civil RICO statute due to the Sedima prior conviction requirement. Such a result is anomalous — the City could sue the bribe-taker under civil RICO, but not the bribe-giver.

These illustrations demonstrate that the prior conviction requirement created in Sedima destroys the efficacy of the civil remedy provision in RICO and consequently the ability of local and state governments to vindicate the public interest by means of that statute.

POINT II

THE RACKETEERING INJURY REQUIREMENT SHOULD BE REJECTED.

There is no basis in the RICO statute for a special "racketeering injury" requirement. A fair reading of Section 1964(c) of RICO, which gives proper attention to Congress' purpose in enacting RICO, is inconsistent with the Second Circuit's opinion in Sedima, supra, 741 F.2d at 494-96, in which just such a requirement was created.

The purpose of RICO — the elimination of organized criminalty, see United States v. Turkette, supra, 452 U.S. at 591 — mandates a broad construction of Section 1964(c), unfettered by any "racketeering injury" requirement. Congress prohibited the commission of organized criminality, as defined in RICO, rather than proscribe "organized crime" per se because "organized crime" is a functional concept which cannot be defined in any principled, legally satisfactory way. See 116 Cong. Rec. 35,344 (1970) (remarks of Congressman Poff). Thus, Congress created a broad remedy

addressed to the kind of misconduct most often engaged in by organized criminals, but which would reach beyond the shadowy boundaries of the organized crime community and apply to anyone engaging in the misconduct. See id.; 116 Cong. Rec. 18,945 (1970) (remarks of Senator McClellan); United States v. Turkette, supra, 452 U.S. at 588-90; Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984).

The Second Circuit undermined Congress' purpose by imposing on the civil remedy provision a racketeering injury requirement. The showing necessary to demonstrate a racketeering injury, which according to the Second Circuit consists of an "injury different in kind from that occurring as a result of the predicate acts themselves," Sedima, supra, 741 F.2d at 496, is a practical impossibility

except in rare cases.* See In re Catanella, 583 F.Supp. 1388, 1436-37 (E.D.Pa. 1984); Ralston v. Capper, 569 F.Supp. 1575, 1580 (E.D. Mich. 1983).

Moreover, the Second Circuit's limitation of the kind of activity which RICO was designed to

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* The Second Circuit's analysis in Bankers Trust Co. v. Rhoades, 741 F.2d 511 (1984), a companion case to Sedima, of how the civil remedy provision in RICO would apply in a case of arson for profit demonstrates that the "distinct RICO injury" requirement deprives the civil remedy provision in RICO of any practical significance. In Bankers Trust, supra, 741 F.2d at 517, the Second Circuit stated that an example of a "distinct RICO injury" could be found where a victim of multiple arsons was denied fire insurance and thereafter was unable to obtain reimbursement for innocent fire damage (e.g., destruction caused by lightning). In contrast, the Second Circuit seemed to indicate that the victim of repeated arsons could not sue the arsonist for fire damage directly resulting from fires set by the arsonist. Plainly, such analysis destroys the effectiveness of the civil remedy provision in RICO as a method for combatting crime, and erodes the doctrine established in City of Milwaukee v. Hansen, supra, that the damage directly resulting from arson — in that case, municipal fire-fighting costs — is compensable in a civil RICO suit. The Bankers Trust analysis undermines the purposes of the civil remedy provision in RICO — augmented compensation to the victim for all of its losses resulting from the criminal scheme, and the economic destruction of the criminal enterprise.

deter to "systemic harm to competition and the market" caused by "mobsters", Sedima, supra, 741 F.2d at 495-96, is not supported by reasoned or principled analysis. The "mobster" requirement is a resurrection of the discredited "organized crime" requirement rejected by most courts which have considered it, see, e.g., Bennett v. Berg, 685 F.2d 1053, 1063, aff'd en banc in pertinent part, 710 F.2d 1361, 1364 (8th Cir. 1982), cert. denied, 104 S. Ct. 527 (1983), including a panel of the Second Circuit in a recent decision, Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21 & n.17. The mobster requirement is either so vague or so limited as to impose an insuperable obstacle to success in a civil RICO suit. For example, the intricate tax-evasion schemes of the beer distributors in City of New York v. Arnmart Wholesale Beer Distributors, Inc., supra, certainly constituted organized criminality; but it is not so clear that the beer distributors were "mobsters," as that term is used in common parlance. The vagueness of the term "mobster" — if

it is a required element in a civil RICO action — would make proof of this element a practical impossibility, and would eliminate RICO liability for categories of malefactors certainly intended by Congress to fall within the reach of RICO.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE DECISION OF THE COURT OF APPEALS SHOULD BE REVERSED.

February 28, 1985.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SEDIMA, S.P.R.L.

PETITIONER,

v.

IMREX CO., INC.,
GIDON ARMON AND JACOB ARMON,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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No. 84-648

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

SEDIMA, S.P.R.L.

PETITIONER,

v.

IMREX CO., INC.

RESPONDENT,

On Writ of Certiorari
to the Court of Appeals
for the Second Circuit

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the State of Arizona, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, New York*, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.**

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*The State of New York wishes to express its support for the positions expressed by Amici without formally joining on the brief.

**The assistance in the preparation of this brief of Professor G. Robert Blakey of the Notre Dame Law School and Blake A. Bailey (Notre Dame '86), Thomas F. Merrick (Notre Dame '86), Christine M. North (Notre Dame '85), Maryellen O'Neil (Notre Dame '86), Donald H. Passenger (Notre Dame '86), Olga F. Pribyl (Notre Dame '85), David C. Scheper (Notre Dame '85), Beth A. Schneider (Notre Dame '86), and Louis J. Weber III (Notre Dame '85), is hereby acknowledged.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Congress designed the Act to "strengthen[] the legal tools in the evidence-gathering process, . . . [to] establish[] new penal prohibitions, and . . . [to] provide[] enhanced sanctions and new remedies . . . ." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 923 (1970) (codified at 18 U.S.C. § 1961 (1982)). Congress found that "the sanctions and remedies available" under the current law were "unnecessarily limited in scope and impact." *Id.* Since 1970, the government has used RICO in criminal prosecutions against organized criminal groups, *United States v. Brooklier,* 685 F.2d 1208, 1213 (9th Cir. 1982) ("La Cosa Nostra"), *cert. denied,* 459 U.S. 1206 (1983); political corruption schemes, *United States v. Mandel,* 591 F.2d 1347, 1353, *aff'd by an equally divided court en banc,* 602 F.2d 653 (4th Cir. 1979) (governor of Maryland), *cert. denied,* 445 U.S. 961 (1980); white-collar business offenses, *United States v. Tamura,* 694 F.2d 591, 594 (9th Cir. 1982) (kickbacks from Japanese corporation); *United States v. Marubeni America Corp.,* 611 F.2d 763, 764 (9th Cir. 1980) (payoffs by Japanese corporation), and terrorist groups, *United States v. Bagaric,* 706 F.2d 42, 46 (2d Cir.) (Croatian nationalist), *cert. denied,* 104 S. Ct. 283 (1983). The government has also brought civil suits to free unions dominated by criminal groups. *United States v. Local 560, International Brotherhood of Teamsters,* 581 F. Supp. 279, 282 (D.N.J. 1984), *appeal pending.*

Since 1970, twenty-two states, including Arizona, have followed Congress' lead by adopting similar legislation.[1] The states have employed this legislation in criminal

[1]See Appendix A for the text of Federal RICO. See Appendix B for a resolution of the National Association of Attorneys General.

prosecutions against a wide variety of illegal conduct.[2] Additionally, both state governments and private plaintiffs have used it in civil litigation.[3] Federal RICO decisions have played a vital role in interpreting and upholding analogous state RICO legislation.[4]

Distressingly, however, recent decisions by the lower federal courts manifest a distinct hostility toward the use of civil RICO.[5] State civil RICO defendants are using these decisions to challenge the state legislation and to urge the narrowing of its scope.[6] In the context of federal litigation with pendent state claims, federal courts are also unjustifiably reading into state legislation limitations not intended

[2]*See, e.g., Carlson v. State,* 405 So. 2d 173, 174 (Fla. 1981) (house of ill fame); *Dorsey v. State,* 402 So. 2d 1178, 1180 (Fla. 1981) (drugs); *State v. Whiddon,* 384 So. 2d 1269, 1270 (Fla. 1980) (theft, burglary, arson, and arson to defraud); *Moorehead v. State,* 383 So. 2d 629, 630-31 (Fla. 1980) (auto theft).

[3]*See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. 589, 591, 667 P.2d 1304, 1306 (1983) (securities fraud); *Banderas v. Banco Central del Ecuador,* 10 Fla. Law Weekly 107, Jan. 11, 1985 (foreign exchange fraud).

[4]*See, e.g., Baines v. Superior Court,* 688 P.2d 1037, 1040 (Ariz. Ct. App. 1984) ("[i]n the absence of any Arizona cases, we will look to federal decisional law for guidance"); *Roush v. State,* 413 So. 2d 15, 20-21 (Fla. 1982) (constitutionality of RICO-type civil remedies upheld relying on federal decisions); *Moorehead v. State,* 383 So. 2d at 630-31 (constitutionality of "pattern" in Fla. RICO statute upheld relying on federal decisions.)

[5]*See generally* Horn, *Judicial Plague Sweeps United States 'Resultorientitis' Infects Civil RICO Decisions,* 5 Nat'l L. J., May 23, 1983, at 31, col. 1.

[6]*See, e.g., Arizona ex rel. Corbin v. Pickrell,* 136 Ariz. at 596, 667 P.2d at 1311 (distinct injury limitation rejected, but urged based on federal decisions); *Banderas v. Banco Central del Ecuador,* 10 Fla. Law Weekly at 108-09 n.3 (organized crime limitation rejected; "garden variety" fraud exclusion rejected, but urged, citing *Sedima, S.P.R.L. v. Imrex, Co.,* 741 F.2d 482 (2d Cir. 1984)).

by the state legislature, threatening to frustrate the legislative design.[7] Amici view these developments as ominous because they threaten the exercise of state sovereignty. State legislatures have chosen to follow the 1970 Act, sometimes narrowing, sometimes expanding on the federal model. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for" the legislative branch. *United States v. Rodgers,* 104 S. Ct. 1942, 1948 (1984). A court is "not at liberty to imply . . . condition[s] which . . . [are] opposed to the explicit terms of . . . [a] statute . . . . To [so] hold . . . is not to construe the . . . [statute] but to amend it." *Fedorenko v. United States,* 449 U.S. 490, 513 (1981) (quoting *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 38 (1934)). Accordingly, Amici urge this Court to set its hand firmly against these unconstitutional encroachments of Article I legislative power by Article III courts. *See* R. Jackson, *The Struggle for Judicial Supremacy* 40 (Vintage ed. 1941) ("unwelcome legislative [actions undermined by] 'interpretation' . . . [that] eviscerate[s] them.").

STATEMENT

For the statement of the facts and course of legal proceedings below, the Court is respectfully directed to the briefs of the parties.

Two issues are presented:

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[7]*See, e.g., Plains Resources, Inc. v. Gable,* Civil No. 83-JM-2145, slip op. at 3–5, (D. Colo. 1984) (organized crime limitation read into federal and Colorado RICO statutes), *appeal pending; Divco Construction & Realty Corp. v. Merrill Lynch Pierce Fenner & Smith, Inc.,* 575 F. Supp. 712, 714 (S.D. Fla. 1983) (organized crime limitation read into federal and Fla. RICO statutes in securities fraud area).

(1) Is a private plaintiff's right to recover under civil RICO conditioned on a showing of a prior criminal conviction? (no)

(2) Is a private plaintiff's right to recover under civil RICO conditioned on a showing of distinct injury? (no)

This brief will address issue number one. Amici will file a second brief that will address issue number two and other considerations in behalf of respondents in *American National Bank and Trust Co. v. Haroco, Inc.,* No. 84-822.

SUMMARY OF ARGUMENT

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." Neither the Organized Crime Control Act generally, nor Title IX particularly, was limited to organized crime. RICO provides for criminal and civil sanctions; it also mandates the liberal construction of its provisions. Nothing in the text, legislative history, or purpose of RICO, justifies circumscribing its private civil remedies with a prior criminal conviction requirement or an organized crime limitation.

ARGUMENT

I. RICO WAS BROADLY DRAFTED WITH PUBLIC AND PRIVATE REMEDIES AS GENERAL REFORM AND IT IS TO BE LIBERALLY CONSTRUED TO EFFECTUATE ITS REMEDIAL PURPOSES.

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as the Racketeer Influ-

enced and Corrupt Organizations Title (RICO).[8] RICO's "legislative history clearly demonstrates that . . . [Congress] intended [RICO] to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." *Russello v. United States,* 104 S. Ct. 296, 302 (1983). "[T]he major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette,* 452 U.S. 576, 591 (1981). Nevertheless, "courts are all but unanimous in their refusal to read RICO as prohibiting *only* the infiltration of legitimate organizations." *United States v. Altomare,* 625 F.2d 5, 7 n.7 (4th Cir. 1980) (emphasis added). As such, they faithfully reflect the teaching of *Turkette,* 452 U.S. at 590 ("unpersuaded that Congress . . . confined . . . RICO [to] *only* the infiltration of legitimate business.") (emphasis in original). "[R]ejected [too, has been the] notion that . . . [RICO] applies *only* to organized crime in the classic 'mobster' sense." *United States v. Grande,* 620 F.2d 1026, 1030 (4th Cir.) (emphasis added), *cert. denied,* 449 U.S. 919 (1980). No court of appeals has applied a different rule in a civil context.[9]

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[8] *See generally* Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg,* 58 Notre Dame L. Rev. 237 (1982) (hereinafter cited as *Civil Action)*; Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts — Criminal and Civil Remedies,* 53 Temp. L. Q. 1009 (1980) (hereinafter cited as *Basic Concepts*); Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction,* 95 Harv. L. Rev. 1101 (1982).

[9] *See, e.g., Alexander Grant & Co. v. Tiffany Industries,* 742 F.2d 408, 413 (8th Cir. 1984). District courts, however, continue to read into the statute an organized crime limitation in civil litigation. *See, e.g., Aliberti v. E.F. Hutton & Co., Inc.,* 591 F. Supp. 632, 633 (D. Mass. 1984); *Mon-Shore Management, Inc. v. Family Media, Inc.,* 584 F. Supp. 186, 194-95 (S.D.N.Y. 1984). Accordingly, it is important that this Court firmly establish that RICO sets *one* standard for *all,* to which alternative, but not exclusive, criminal and civil sanctions may be applied and that RICO may *not* be read differently depending on *who* is the defendant or *who* is the plaintiff. Basic concepts of the rule of law require no less. *Magna Carta,* ch. 25 ("one measure of wine . . . through . . . [the] Realm").

One court has objected that so reading RICO works "a revolutionary consequence [nowhere noted] in the legislative history." *Moss v. Morgan Stanley Inc.,* 553 F. Supp. 1347, 1361 (S.D.N.Y. 1983), *aff'd on other grounds,* 719 F.2d 5 (2d Cir. 1983), *cert. denied,* 104 S. Ct. 1280 (1984). The facts do not support that proposition. First, the scope of RICO, as *general* reform *not* limited to organized crime, *is* noted repeatedly in the legislative history. *See Civil Action, supra* n.8, at 272-73, particularly nn.112-13; 275-79, particularly n.116. Second, and most importantly, this proposition ignores the structure of the entire Organized Crime Control Act. The Act is composed of eleven substantive titles, each of which (with two principal exceptions) Congress drafted in light of the *problem* of organized crime, but consciously enacted as *general* reform.[10] This structure is relevant in construing the Organized Crime Control Act, *Iannelli v. United States,* 420 U.S. 770, 786-91 (1975), including RICO, *Russello,* 104 S. Ct. at 300.

Only Titles V (witness protection) and VI (depositions) were limited by Congress to "organized criminal activity." 84 Stat. 933 (1970); 84 Stat. 934 (1970) (codified at 18 U.S.C. § 3503 (1982)).[11] The presence of this limitation in Titles V and VI clearly indicates Congress' intent *not* to have it (or any phrase similarly limiting the scope of the Act) read into its general provisions. *Russello,* 104 S. Ct. at

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[10] *See* Title I (grand jury: indictments not limited, but reports limited to "organized crime conditions"); Title II (immunity: applicable to all court, administrative and congressional proceedings), Title III (all recalcitrant witnesses); Title IV (all false declarations); Title VII (all sources of evidence); Title VIII (all syndicated gambling); Title X (all sentencing); and Title XI (all explosives).

[11] Even that phrase has been appropriately read broadly to include "white collar crime." *United States v. Carter,* 493 F.2d 704, 708 (2d Cir. 1974) (construction of Section 3503). *But see United States v. Singleton,* 460 F.2d 1148, 1155-59 (2d Cir. 1972) (Oakes, J., dissenting).

300; *United States v. Aleman*, 609 F.2d 298, 303-04 (7th Cir. 1979) ("Congress knew . . . how to limit a provision . . . if that was what was intended."), *cert. denied,* 445 U.S. 946 (1980). *See also Ohio v. Kovacs*, 105 S. Ct. 705, 709 (1985). Congress, in effect, removed that limitation from Title VI in 1975, 89 Stat. 373, 374 (1975). It was removed from Title VI in 1975, 89 Stat. 373, 374 (1975). It was removed from Title V in 1984, Witness Security Reform Act of 1984, 98 Stat. 2153 (1984). Indeed, on each subsequent occasion that Congress has acted and amended the Organized Crime Control Act or RICO, it has broadened, not narrowed it. Finally, courts have rejected efforts to deny that the 1970 Act worked *general* reform under its other titles.[12] Accordingly, the Organized Crime Control Act, including Title IX, conforms to a consistent pattern of federal legislation enacted over the past half century as general reform aimed at a specific target, but not restricted in its drafting to that specific target.[13]

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[12] *See, e.g., United States v. Box*, 530 F.2d 1258, 1265 n.19 (5th Cir. 1976) (Title VIII (18 U.S.C. § 1955 (1982)) not limited to organized crime); *United States v. Sacco*, 491 F.2d 995, 1011-13 (9th Cir. 1974) (Ely, J., dissenting) (Title VIII unconstitutional under commerce clause, since not limited to organized crime); *United States v. Schell*, 692 F.2d 672, 674 (10th Cir. 1982) (Title X (18 U.S.C. § 3575 (1982)) not limited to organized crime); *United States v. Schwanke*, 598 F.2d 575, 578 (10th Cir. 1979) (Title XI (18 U.S.C. § 844 (1982)) not limited to organized crime).

[13] *See, e.g.*, 18 U.S.C. § 224 (1982) (sports bribery) held not limited to organized crime in *United States v. Walsh*, 544 F.2d 156, 159 (4th Cir. 1976), *cert. denied,* 429 U.S. 1093 (1977); 18 U.S.C. §§ 891-894, 896 (1982) (loan sharking) held not limited to organized crime in *United States v. Keresty*, 465 F.2d 36, 43 (3d Cir. 1972), *cert. denied*, 409 U.S. 991 (1972); 18 U.S.C. § 1510 (1982) (obstruction of criminal investigation) held not limited to organized crime in *United States v. Koehler*, 544 F.2d 1326, 1330 n.6 (5th Cir. 1977); 18 U.S.C. § 1951 (1982) (extortion) held not limited to racketeering in *United States v. Culbert*, 435 U.S. 371, 373-74 (1978); 18 U.S.C. § 1952 (1982) (Travel Act) held not limited to organized crime bribery in *Perrin v. United States*, 444 U.S. 37, 46 (1979); *United States v. Wander*, 601 F.2d 1251, 1257-58 (3d Cir. 1979) (not limited to organized crime); 18 U.S.C. § 1953 (1982) (lottery tickets) held not limited to organized crime in *United States v. Fabrizio*, 385 U.S. 263, 265-67 (1966); 18 U.S.C. § 2113(b) (1982) (bank robbery) held not limited to gangsters in *Bell v. United States*, 103 S. Ct. 2398, 2400-02 (1983); 18 U.S.C. § 2114 (1982) (assault on custodian of property of United States) held not limited to postal carriers in *Garcia v. United States*, 105 S. Ct. 479, 481-85 (1984); 18 U.S.C. §§ 2421-2424 (1982) (white slave traffic) held not limited to commercial prostitution in *Caminetti v. United States*, 242 U.S. 470, 485-90 (1917).

18 U.S.C. § 1962 sets forth "standards" of "unlawful" conduct, which are enforced through "criminal" and "civil" sanctions. Section 1962 says "unlawful," not "criminal." As such, RICO is not, as some courts have stated, "primarily a criminal statute." *In re Action Industries Tender Offer*, 572 F. Supp. 846, 849 (E.D. Va. 1983). Section 1963 sets out the criminal remedies, which include imprisonment, fine and criminal forfeiture. Section 1964 provides civil remedies, including injunctive and other equitable relief, as well as treble damages. "Person" under 18 U.S.C. § 1961(3) defines the class who may sue or be sued civilly under Section 1964 for violations of Section 1962; by contrast, "whoever" under 1 U.S.C. § 1 defines the class who may be indicted for violations of Section 1962 under the criminal provisions of Section 1963. *See Civil Action* at 243 n.20; *Basic Concepts, supra*, n.8 at 1021 n.71. Accordingly, the class of defendants under criminal RICO is more restricted than the class of defendants under civil RICO. As such, RICO's civil scope is broader than its criminal scope; RICO is not, therefore, primarily criminal or punitive, but primarily civil and remedial. *See United States v. One Assortment of 89 Firearms*, 104 S. Ct. 1099, 1105-06 (1984) (dealing with 18 U.S.C. §§ 922(a)(1), 924(d) (1982)).[14] Its civil remedies, which require no more than a showing of a preponderance of the

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[14] *See also* 115 Cong. Rec. 6,993 (1969) (statement of Sen. Hruska: "The criminal provisions [of RICO] are intended primarily as an adjunct to the civil provisions which I consider as the more important feature of the bill"). The reliance of *Sedima, S.P.R.L. v. Imrex Co.*, 741 F.2d 482, 500 n.49 (2d Cir. 1984) on *Boyd v. United States*, 116 U.S. 616, 634-35 (1886) in arguing for a contrary view is misplaced in light of this Court's decisions, not only in *One Assortment of 89 Firearms*, 104 S. Ct. at 1104

evidence, are available to either the government or private parties. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974) (government suit), *cert. denied*, 420 U.S. 925 (1975); *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1166-67 (5th Cir. 1984) (private suit).

Congress could not have more clearly manifested its intent that courts construe RICO as a remedial statute containing both criminal and civil sanctions. 84 Stat. 947 (1970) ("remedial purposes"); S. Rep. No. 617, 91st Cong., 1st Sess. 82 (1969) (Title IX "is remedial rather than penal"). When Congress so classifies a statute, the classification is entitled to great deference. *One Assortment of 89 Firearms*, 104 S. Ct. at 1106. Statutory classifications, moreover, control over federal common law classifications. *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-15 (1981). Accordingly, this Court has recognized the remedial character of civil RICO. *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"). The traditional canon of statutory construction for such statutes requires courts to construe them liberally. *Brady v. Daly*, 175 U.S. 148, 154-58 (1899) (certain sum damages); *Farmers' and Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875) (statutory forfeiture). Congress, of course, settled the issue of what canon of construction courts should use in interpreting RICO by including a liberal construction clause. 84 Stat. 947 (1970) ("The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes.") A majority of the lower courts have faithfully followed the liberal construction clause under RICO's criminal provisions. *Civil Action* at 245 n.25, 288 n.150. Those judges who have questioned its application in criminal cases have generally conceded its application in civil cases. *See, e.g., United States v. Mandel,*

(Coffey v. United States, 116 U.S. 476 (1886) *(Boyd extended)* "disapproved") *but* also *Fisher v. United States*, 425 U.S. 391, 407-08 (1976) (*Boyd* "not stood the test of time").

415 F. Supp. 997, 1022 (D. Md. 1976), *rev'd on other grounds*, 591 F.2d 1347, *aff'd by equally divided court en banc*, 602 F.2d 653 (4th Cir. 1979), *cert. denied*, 445 U.S. 961 (1980). Nevertheless, judicial acceptance of the liberal construction directive has, in fact, been mixed on the civil side.[15] Judicial hostility to the application of the liberal construction clause to civil RICO is unjustified, and its impact on these appeals is decisive.[16] The language of RICO should be read in the

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[15] *Compare USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94, 95 n.1 (6th Cir. 1982) ("Congress intended that RICO be liberally construed . . .") *with Saine v. A.I.A., Inc.*, 582 F. Supp. 1299, 1305 (D. Colo. 1984) (treble damages must be strictly construed).

[16] This Court in *Russello*, 104 S. Ct. at 302 noted the unusual character of the liberal construction clause in a federal criminal statute. Such a liberal construction clause is not unusual in state law. It had its origins in the codification movement of the 19th century. Edward Livingston suggested the rejection of the old common law rule of strict construction in the farsighted code he drafted for Louisiana between 1820 and 1825. 1 E. Livingston, *Complete Works on Criminal Jurisprudence* 231 (1873 ed.) and 2 *Complete Works* 14 ("all penal laws whatever are to be construed according to the plain import of their words . . . . "), Livingston's suggestion for Louisiana was followed by David Dudley Field in his influential draft of codes of penal law and criminal procedure for New York. *The Code of Penal Law* 5 (1865 ed.) ("fair import"); *The Code of Criminal Procedure* 470-71 (1850 ed.) ("liberal construction") (old rule had no support in any "principle of substantial justice, and . . . [its] highest aim, practically considered seem[ed] to be, to render that law inconsistent with its spirit and as a consequence, absurd and ridiculous.") Ultimately, Livingston's and Field's work formed the intellectual basis for the Federal Rules of Civil and Criminal Procedure. C. Wright & A. Miller, *Federal Practice and Procedure* § 104 (1969). Judicial hostility to change through legislation, however, was common at that time. J. Hurst, *The Growth of American Law* 186 (1950):

> "[W]here [judges] were not ready boldly to declare [it] unconstitutional, [they were ready] to interpret it so restrictively as to narrow its effect.
>
> These factors found expression in the abstract canons of statutory interpretation . . . : strict construction of statutes in derogation of the common law; strict construction of penal statutes, or of legislation that imposed 'drastic' burdens, or of legislation that imposed special damages . . . .
>
> The effect was to put a primarily obstructive, if not destructive, connotation on the process of statutory interpretation."

same fashion whether the character of the suit is criminal or civil. *Alcorn County, Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1170-71 (5th Cir. 1984); *Slattery v. Costello*, 586 F. Supp. 162, 164 (D.D.C. 1983) ("hard pressed to justify a narrower construction of RICO's civil cause of action than afforded RICO's criminal provisions.").[17]

The public and private civil enforcement provisions of RICO are modeled on, but are not identical to, the antitrust laws.[18] Like the antitrust laws, RICO creates "a private enforcement mechanism that . . . deter[s] violators . . . [and] provide[s] ample compensation to the victims." *Blue Shield v. McCready*, 457 U.S. 465, 472 (1982). A private

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Legislatures reacted: "[I]t became standard practice in drafting statutes to insert a preamble stating broadly the purpose of the act and to close with a provision declaring that the statute should be liberally construed." D. Wigdor, *Roscoe Pound: Philosopher of Law* 174 (1974); see also, E. Patterson, *Jurisprudence: Men and Ideas of the Law* 421 (1953). In fact, a majority of states has abolished the common law rule. The statutes and relevant decisions are collected in *Civil Action* at 245 n.25. The reliance of *Sedima*, 747 F.2d at 188 n.17 on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) in arguing for a contrary view is misplaced in light of *TVA v. Hill*, 437 U.S. 153, 187 n.33 (1978). *United Steelworkers of America v. Weber*, 443 U.S. 193, 201-03 (1979), a civil rights decision, did not purport to reestablish *Church of the Holy Trinity* as a general rule. *See Rubin v. United States*, 449 U.S. 424, 430 (1981) (*Hill* followed).

[17] *See Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (antitrust) (Holmes, J., dissenting) ("The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction.")

[18] S. Rep. No. 617, 91st Cong., 1st Sess. 81 (1969); H.R. Rep. No. 1549, 91st Cong., 2nd Sess. 56-60 (1970). RICO and the antitrust laws are well integrated. "There are three possible kinds of force which a firm can resort to: violence (or the threat of it), deception, or market power." C. Kaysen and D. Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust focuses on the third.

"treble-damages remedy [is needed] . . . precisely for the purpose of encouraging *private* challenges to . . . violations." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis in original).[19] "Private . . . litigation is one of the surest

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[19] The idea of multiple damages for certain kinds of unlawful practices has deep roots. The earliest such provision in English law was the Statute of Gloucester, 6 Edw. 1, ch. 5 (1278) (treble damages for waste). Modern antitrust statutes had their origin in the Statute Against Monopolies, 21 Jac. 1, ch. 3, § 4 (1624) (authorizing treble damages for those injured by unlawful monopolies). Parliament recognized that it was "one thing to pass statutes and . . . quite another then to insure that [they were] actually enforced." 4 W. Holdsworth, *A History of English Law* 355 (3d ed. 1945). Accordingly, "it was a common expedient [in the Middle Ages and beyond] to give the public at large an interest in seeing that a statute was enforced . . . ." *Id.* It was also an idea found in early colonial laws. *See, e.g., The Laws and Liberties of Massachusetts* 5 (pilfering and theft: treble damages), 24 (gaming: treble damages) (1648). In turn, the idea of multiple damages for various kinds of wrongs was a characteristic feature of Roman law. The "delict" of theft ran back at least to the Twelve Tables (450 B.C.). *The Institutes of Gaius* (Part I) (Text with Critical Notes and Translation by F. de Zulueta) at 217 (1958). "[T]he penalty . . . [was] four times the value of the thing stolen" when the offender was caught in the act; otherwise, it was "double." A. Watson, *The Law of the Ancient Romans* 76 (1970). Extortion was remedied by four times the loss. *Id.* at 80. Possession of stolen property was remedied by three times the value of the property. *Id.* at 77. Greek law provided for double damage if stolen property was recovered; tenfold damages otherwise. 5 C. Kennedy, *The Orations of Demosthenes*, app. VI 187 (1909) (quoting a law of Solon), *quoted in*, J. Wigmore, *Panorama of the Worlds Legal Systems* 343 (1936). Biblical law, too, reflected multiple damage recovery. *Exodus* 22:1 (theft of ox or sheep, if killed, restoration of five for ox and four for sheep); *Exodus* 22:9 (trespass to property double damages); 2 Samuel 12:1-6 (restoration of fourfold for taking of lamb).

Modern economic analysis supports the wisdom of this history. *See generally*, R. Posner, *Economic Analysis of Law* § 7.2 (2d ed. 1977). Professor (now Judge) Posner argues for private enforcement mechanisms of more than actual damages against deliberate anti-social conduct, particularly where the factor of concealment is present. *Id.* at 462 (private enforcement); 143, 272 (more than actual damages for deliberate conduct); 235 (concealment). Concealment is the sine qua non of most RICO-type behavior particularly fraud. *See GAO: Fraud In Government Programs — How Extensive Is It? — How Can It Be Controlled?* (1980) ("Most fraud is undetected. For those . . . committing fraud, the chances of being prosecuted and eventually going to jail are slim . . . . The sad truth is

weapons for effective enforcement" of the law. *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965), (*quoting Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)). Private civil suits "provide a significant supplement to the limited resources available to the government." *Id.*[20] No need exists "to burden the private litigant beyond what is specifically set forth" in the statute. *Id.*

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that crime against the Government often does pay.") If we authorize the recovery of only actual damages for deliberate anti-social conduct engaged in for profit, we let the perpetrator know that if he is caught, he must return the misappropriated sums. If he is not caught, he may keep the money. Even if he is caught and sued, he may be able to defeat part of the damage claim or at least compromise it. In short, the balance of economic risk under traditional single damage recovery provides little economic disincentive to those who engage in such conduct. *See* R. Posner, *Antitrust Law: An Economic Perspective* 223 (1976) ("If, because of concealability, the probability of being punished for a particular . . . violation is less than unity, the prospective violator will discount (i.e., multiply) the punishment cost by that probability in determining the expected punishment cost for the violation.") In fact, as the court in *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 399 n.16 (7th Cir. 1984) observed:

> [It is also true that] the delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls.

Similarly, studies under the antitrust statute show that most treble damage suits are now settled at close to actual damages. *Study of the Antitrust Treble Damage Remedy*, Serial No. 8, House Comm. on the Judiciary, 98th Cong., 2d Sess. 14 (1984). No reason exists to believe that a similar pattern will not develop under RICO, at least in the commercial fraud area. Ironically, it may be necessary to authorize treble damages to assure that deserving victims receive actual damages in the RICO area.

[20] In fact, between 1960 and 1980, of the 22,585 civil and criminal antitrust cases brought, 84% were instituted by private plaintiffs. *U.S. Dep't of Justice Source Books of Criminal Justice Statistics 1981* 431.

While the language of a statute "must ordinarily be regarded as conclusive," it can, of course, give way to a "clearly expressed legislative intention to the contrary" found in the statute's legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).[21] When RICO's legislative history is carefully and fully reviewed, it confirms that "Congress meant what it said." *INS v. Phinpathya*, 104 S. Ct. 584, 593 (1984). *See Civil Action* at 280:

> [A] review of the legislative history of . . . [the Organized Crime Control Act] in general, and Title IX in particular, establishes the following points beyond serious question:
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> (1) Congress fully intended, after specific debate, to have RICO apply beyond any limiting concept like "organized crime" or "racketeering";

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[21] Four basic assumptions are integral to any principled effort to interpret a statute. F. Dickerson, *The Interpretation and Applications of Statutes* 7-12 (1975): (1) legislative supremacy within the constitutional framework (U.S. Const. art. I, § 1); (2) the use of the statutory vehicle to exercise that supremacy; (3) reliance on accepted means of communication; and (4) reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning.

See L. Hand, "The Contribution of an Independent Judiciary," in *The Spirit of Liberty* 119-20 (I. Dilliard ed., Vintage ed. 1959):

> 'Enacted law[s]' . . . [are] ordinarily a compromise of conflicts . . . . [T]hey should be loyally enforced until they are amended by the same process which made them. That is the presupposition upon which the compromises were originally accepted; to disturb them . . . imperils the possibility of any future settlements and . . . upsets the whole system.

See also, Garcia v. United States, 105 S. Ct. 479, 483 (1984); *Blum v. Stenson*, 104 S. Ct. 1541, 1548 (1984); *United States v. Apfelbaum*, 445 U.S. 115, 121 (1980) (construction of Title II of Organized Crime Control Act).

(2) Congress deliberately redrafted RICO outside of the antitrust statutes, so that it would not be limited by antitrust concepts like "competitive," "commercial," or "direct or indirect" injury;

(3) *Both* immediate victims of racketeering activity *and* competing organizations were contemplated as civil plaintiffs for injunction, damage, *and* other relief;

(4) Over specific objections raising issues of federal-state relations and crowded court dockets, Congress deliberately *extended* RICO to the general field of commercial and other fraud; and

(5) Congress was well aware that it was creating important new federal criminal and civil remedies in a field traditionally occupied by common law fraud. (emphasis in original).

II. RICO DOES NOT REQUIRE A PRIOR CRIMINAL CONVICTION AS A PREREQUISITE FOR A PRIVATE CIVIL SUIT.

Sedima, S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 496, 501 (2d Cir. 1984) holds that a private litigant's right to bring a claim for relief under RICO is conditioned on a showing of a prior criminal conviction under either RICO or one of its predicate offenses. Because that holding has no support in the text, legislative history, or jurisprudence of RICO, this Court should reject it.[22]

[22] It is significant that counsel in *Sedima* did not even consider the point worthy of mention before the District Court or in the briefs in the Court of Appeals. The Court of Appeals raised the point *sua sponte*. Had *Sedima* had the benefit of adversary argument, it might have had brought to its attention the substantial policy reasons rooted in considerations of the administration of criminal RICO, matters beyond the scope of Amici interests, why Congress would *not* have required a criminal conviction as a condition for a private civil suit. It is doubtful that Congress would have equipped prosecutors with the power to use the threat of a private treble damage action to coerce a guilty plea. Nor would Congress have subjected prosecutors to the possibility of private importuning to bring RICO-related criminal prosecutions or charges of acting as stalking horses for such private interests. Similarly, it would not have undermined the credibility of complaining witnesses in RICO criminal cases by making them vulnerable to cross-examination about their hopes to obtain treble damage relief, if, but only if, the government secures a conviction.

Analysis of RICO must, of course, begin with its text. *Russello*, 104 S. Ct. at 299 (quoting *United States v. Turkette*, 452 U.S. at 580). The "assumption [is] that the legislative purpose is expressed by the ordinary meaning of the words used." *Id.* (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). *See also Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 105 S. Ct. 658, 662 (1985). "The language of . . . [RICO is] the most reliable evidence of . . . [Congress'] intent . . . ." *Turkette*, 452 U.S. at 593. The plain language of RICO, however, nowhere requires that a civil defendant be "convicted," but only requires that the acts in question be "indictable," or that there be a "violation" — not a "conviction."[23]

[23] "Racketeering activity" includes any act involving certain state offenses "chargeable" and "punishable" under state law. 18 U.S.C. § 1961(A) (1982).

"Racketeering activity" also includes any act involving certain federal offenses "indictable" or "punishable" under federal law. 18 U.S.C. § 1961(B)(C)(D) (1982).

18 U.S.C. § 1962 sets out that conduct that is unlawful under RICO. It prohibits certain investments, acquisitions and operations involving racketeering activity.

18 U.S.C. § 1963 provides that "[w]hoever *violates* any provision of Section 1962" may be criminally sanctioned.

18 U.S.C. § 1964(a) provides that district courts have jurisdiction to prevent and restrain "*violations* of Section 1962."

18 U.S.C. § 1964(b) authorizes the Attorney General to institute suits under Section 1964.

18 U.S.C. § 1964(c) authorizes "[a]ny person injured in his business or property by a *violation* of Section 1962" to sue.

For the purposes of this analysis, the key words are "chargeable," "indictable," "punishable" and "violation."

The Organized Crime Control Act is "a carefully crafted piece of legislation." *Iannelli v. United States*, 420 U.S. 770, 786-89 (1975). Accordingly, it is significant that when Congress wanted to say "conviction," it said "conviction," not "violation."[24]

Sedima suggests that "had Congress considered . . . [a criminal conviction limitation] it would have explicitly required previously established convictions in the context of section 1964(c)." 741 F.2d at 501. The record contradicts *Sedima*'s suggestion that Congress did *not* consider the question. Congressman (now Judge) Mikva, a vocal and knowledgeable[25] opponent of RICO in the House Judiciary Committee and on the House floor, specifically objected that RICO's private claim for relief might lead to the federalization of state offenses and frivolous law suits that would harass legitimate business. Accordingly, he proposed an

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The ordinary meaning of the suffix "able" is "capable of, fit for, or worthy of (being so acted upon or toward) — chiefly in adjectives derived from verbs . . . ." *Webster's Third New International Dictionary* 4 (unabridged) (1961). Accordingly, it does *not* mean, in fact, so acted upon.

The ordinary meaning of the term "violation" is "an infringement or transgression." *Id.* at 2554. Accordingly, it is *not* limited to criminal infringements or transgressions.

[24] 18 U.S.C. § 1963(c) (1982) ("conviction") (provision dealing with seizure); 18 U.S.C. § 3575(e)(1) (1982) ("convicted," "convictions," and "conviction") (enhanced sentencing provisions for dangerous special offenders enacted as part of Title X, 84 Stat. 949 (1970)). *Sedima* asks why Congress chose "violation" rather than "forbidden" as in the antitrust statutes. 741 F.2d at 498 n.46. The court did not explain why Congress needed a specific reason to prefer modern to late Victorian word usage. *See also* "Trademark Counterfeiting Act of 1984," 98 Stat. 2182 (1984) (treble damages for "violation" of Lanham Act).

[25] Congressman Mikva, along with Senators McClellan and Hruska and Congressman Poff, the chief sponsors of the Organized Crime Control Act including its RICO provisions, served together on the National Commission on the Reform of Federal Criminal Law, from which came a number of key concepts embodied in RICO. *Civil Action* at 253 n.47.

amendment authorizing treble damages for businesses subjected to frivolous RICO suits. 116 Cong. Rec. 35,342 (1970). Pointing out the breadth of RICO, Congressman Mikva noted: "[T]here need not be a conviction under any of these laws for it to be racketeering." No member of Congress objected to Mikva's remarks or even suggested that the statute, as drafted, required convictions; they could not, for Mikva's charge was true. The House, however, soundly defeated Congressman Mikva's proposed amendment. *Id.* at 35,343.[26]

Not surprisingly, *Sedima*'s criminal conviction requirement sets it apart from the other courts of appeals that have interpreted RICO in either criminal or civil contexts. Prior criminal indictments for the predicate offenses are not required for a RICO prosecution. *United States v. Parness*, 503 F.2d 430, 441 (2d Cir. 1974), *cert. denied*, 419 U.S. 1105 (1975). *See also Commonwealth v. Taraschi*, 475 A.2d 744, 749 (Pa. Super 1984) (no requirement of conviction of predicate crime under Pa. RICO). Indeed, the cases uniformly establish that the terms "chargeable," "indictable," and "punishable" merely incorporate the definitions of state and federal law; they play no other role. The government may, for example, bring a *federal* RICO prosecution, when it is *not* possible to bring a *state* prosecution because of a prior *not* guilty verdict. *See, e.g., United States v. Licavoli*, 725 F.2d 1040, 1047 (6th Cir. 1984). The other courts of appeals that have directly faced the issue have held that no prior criminal conviction is required in government civil suits, *Cappetto*, 502 F.2d at 1356-57, or private civil suits, *Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983); *USACO Coal Co.*, 689 F.2d

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[26] The *Sedima* opinion notes (without quoting) the objections of Congressman Mikva only in the context of its general discussion of RICO's legislative history. 741 F.2d at 490 n.22.

at 95 n.1. Thus, this Court should reject the criminal conviction requirement.[27]

Adopting a prior criminal conviction requirement is a radical and an unwise departure from precedent. Yet *Sedima* seeks to justify this departure, based not so much on RICO's text or legislative history, but on the Court's assessment of RICO's wisdom. RICO, the court argued, carries with it a stigma — that of "racketeer."[28] The *Sedima* majority argued that if it did not impose the criminal conviction requirement, it would have to impose a proof beyond a reasonable doubt standard. 741 F.2d at 499. Even *Haroco, Inc. v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 404 (7th Cir. 1984), considered increasing the burden of proof in the context of civil RICO.

The concerns of these courts are unfounded. Congress modeled RICO on the antitrust laws, which are also

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[27] RICO's operative terms play an identical role in both government criminal and civil litigation *and* in private civil suits. "There is a unity of verbal structure that is a symptom of an inner unity, a unity of plan and function." *Moore Ice Cream Co., Inc. v. Rose*, 289 U.S. 373, 378 (1933) (Cardozo, J.) "An interpretation of [a] statute which would render different sections inconsistent with each other cannot be the true one." *Perrine v. Chesapeake and Delaware Canal Co.*, 50 U.S. (9 How.) 172, 187 (1850) (Taney, C.J.). Accordingly, it is difficult to see how the same words are to be given such radically different constructions in government and private RICO suits. *See also Mills Music, Inc. v. Snyder*, 105 S. Ct. 638, 646 (1985).

[28] On the use of the word "racketeer" in RICO, *see Civil Action* at 250 n.41. *Compare Webster's Third New International Dictionary* 1871 (unabridged) (1961) ("use fraud or intimidation in extorting money or commercial or political advantage") *with Monsanto Chemical Co. v. Perfect Fit Products Mfg. Co., Inc.*, 349 F.2d 389, 396 (2d Cir. 1965) (Lumbard, C.J.) (trademark infringement litigation: defendant labeled "commercial racketeer"). *See also* Note *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1107 (1982) ("RICO claims can stigmatize defendants only if courts restrict the applicability of the broad statutory language to proven organized criminals"). Indeed, the stigma flows, if at all, from the criminal conviction, not a civil complaint or verdict.

enforced through government criminal and civil actions as well as private claims for relief, including suits for treble damages. Civil antitrust actions require no criminal conviction. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) (a conviction requirement would "take from the statute a great deal of its power"). Proof by a preponderance is sufficient in civil proceedings. *Ramsey v. UMW*, 401 U.S. 302, 307-11 (1971). No sound reason exists to treat RICO differently.

Perspective is called for. Our society knows no mark of shame more stigmatizing than that of Cain, yet homicide may be both murder and wrongful death. *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Traditionally, civil recovery for wrongful death having criminal characteristics may be obtained without showing a prior criminal conviction or meeting an increased burden of proof. *See, e.g., Louisville Evansville and St. Louis R.R. v. Clarke*, 152 U.S. 230, 235-42 (1894) ("wholly civil in character").[29] Similarly, murder may be an issue in the imposition of a constructive trust or the voiding of a bequest, yet a conviction is not required, and the homicide may be shown by a preponderance of the evidence.[30]

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[29] *See Watson v. Adams*, 187 Ala. 490, 494, 65 So. 528, 533 (1914) (wrongful death) ("Great as the love of money may be in some human beings, it cannot be presumed that to be held liable for damages is, to the ordinary man, the equivalent of the impending, unless diverted, exaction of his freedom or his life . . .") *See also, Boston and Worcester R.R. v. Dana*, 67 Mass. (1 Gray) 83, 96-100 (1854) (Rejection of English rule requiring conviction in felonious taking of goods rejected) ("If a party is compelled to wait the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon.")

[30] *See, e.g., Small v. Rockfeld*, 66 N.J. 231, 245, 330 A.2d 335, 343 (1974) (no conviction required); *Burns v. United States*, 200 F.2d 106, 107 (4th Cir. 1952) (acquittal in criminal case not defense in civil case where murder at issue); *Uniform Probate Code* § 2-803(e) (1983) (conviction for murder not required and killing may be shown by preponderance of the evidence); *Restatement of the Law of Restitution* § 187, comment f. (1937)

The underlying problem with *Sedima*'s analysis is that it fails to recognize that society treats a criminal conviction much differently than it treats an adverse civil judgment. It is manifest that Congress did not intend to impose a criminal conviction requirement or to circumscribe RICO by increased burdens of proof.[31] Accordingly, no valid reason

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(conviction not required before imposition of constructive trust for murder). The cases are comprehensively collected and analyzed in Groom, *Proof of Crime in a Civil Proceeding*, 13 Minn. L. Rev. 556 (1929). Generally, neither a conviction nor a special burden of proof is imposed, for example, when it is necessary to show a kickback that is subject to both criminal and civil sanctions. *United States v. Acme Process Co.*, 385 U.S. 138, 146 (1966). A different rule on the burden of proof has, of course, been applied for special historical reasons in the area of fraud, but this Court has refused to extend it to remedial statutes. *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 691 n.27 (1983). State courts, too, in construing state treble damage legislation have not imposed special burdens of proof, *Jensen v. Brinks & Erb, Inc.*, 452 N.E.2d 414, 416 (Ind. App. 1983), or required a criminal conviction, *Americar Leasing, Inc. v. Maple*, 406 N.E.2d 333, 335 (Ind. App. 1980). *See also Senfeld v. Bank of Nova Scotia Trust Co.*, 450 So. 2d 1157, 1163-64 n.9 (Fla. App. 1984). State RICO legislation generally requires on its face neither a conviction nor a special burden of proof. *See* Appendix A. This Court has rejected such state legislative policy choices on burden of proof in civil proceedings and has imposed special requirements on federal legislation only in narrow classes of areas. *Stantosky v. Kramer*, 455 U.S. 745, 766-67 (1982) (termination of parental rights), *Addington v. Texas*, 441 U.S. 418, 433 (1979) (involuntary civil commitment); *In re Winship*, 397 U.S. 358, 361-368 (1970) (juvenile delinquency); *Woodby v. INS*, 385 U.S. 276, 285-86 (1966) (deportation). *See generally* 9 J. Wigmore, *Evidence*, § 2498 at 327 (3d ed. 1942) ("Policy suggests that . . . [the reasonable doubt rule] should be strictly confined to its original field and that there ought to be no attempt to employ it in any civil case."); *Civil Action* 258 n.59 (legislative history of RICO reviewed under prevailing jurisprudence: preponderance proper standard).

[31] The imposition of a criminal conviction requirement would have a debilitating effect on the private civil claim for relief, and its adoption would amount to the de facto rejection of the concept of the private attorney general embodied in the very design of RICO. No separate statistics on RICO legislation are kept by the Administrative Office of the United States Courts. Nevertheless, it may be possible to make order of magnitude estimates from the information published. *See generally, Annual Report of the Director of the Administrative Office of the United States Courts* (1983). Approximately 250,000 civil cases are filed each year in U.S. district court. *Id.* at 122. Approximately 35,000 criminal-prosecutions are brought. *Id.* at 164. Slightly more than 95,000 of the civil cases involve the United States as a plaintiff or defendant; private litigation comprises approximately 145,000 filings, of which 60% is federal question and 40% is diversity litigation. *Id.* at 121. The principal areas of litigation are recovery of overpayments and enforcement of judgments (41,000), prisoner petitions (30,000), social security (20,000), civil rights (20,000) and labor (11,000). *Id.* at 122. Antitrust includes 1,200 civil filings, *id.*, and 74 criminal cases. *Id.* at 164. All criminal prosecutions of extortion, racketeering and threats amount to 478. *Id.* at 320. Securities, commodities, and exchange related civil filings make up 3,000, *id.* at 122, and 26 criminal cases. *Id.* at 319. Fraud related civil filings make up 1,848. *Id.* at 245. Accordingly, if most securities and fraud-related cases were also RICO cases, RICO filing would not exceed 5,000, not more than 2% of all federal filings. How much new litigation, particularly in the fraud area, RICO will draw into the federal courts cannot be reliably determined. It is doubtful, however, that the amount will be relatively high, as most significant commercial litigation is now in the federal courts under other federal statutes or diversity jurisdiction. On the litigation explosion, *see* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983). What these data do show, particularly in the antitrust and securities areas, is that the prior criminal conviction limitation would reduce civil RICO litigation to the point where its promise of "enhanced sanctions and new remedies," 84 Stat. 923 (1970), would be hollow, if not wholly broken.

exists to impose a criminal conviction requirement on private civil RICO. *Blue Chips Stamps v. Manor Drug Store*, 421 U.S. 723, 748 (1975) ("[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability.").

CONCLUSION

This Court should reject the judicial effort to read into civil RICO a prior criminal conviction requirement.[32]

Respectfully Submitted,

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[32] The comments of Congressman Steiger in the closing hours of the House debate on the Organized Crime Control Act are worth noting:

> [I]n this country today, if a poor man's son commits a crime and a rich man's son commits the same crime, the chances are that the poor man's son will receive the full weight of justice and the rich man's son will either get off or receive a much lighter sentence. It is unfortunate, but this is a fact of life.
>
> I will submit to all of you distinguished members of the bar that is exactly what happened with organized crime. It is a fact of life. Because of the sophistication, because of the wealth, and because of the ability of organized crime to keep the best counsel, they have been able to abrogate the law. 116 Cong. Rec. 35,355 (1970).

If the "sophisticated" argument of the *Sedima* opinion is accepted, Congressman Steiger will have proven himself not only a sponsor of civil RICO, but a prophet of its fate in the hand of the courts.

Appendix A

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE (18 U.S.C. 1961-1968)

As amended, October 25, 1984

§ 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2320 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States

Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred

in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an

unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States, irrespective of any provision of State law —

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any —

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly and indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes —

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (m) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(e)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section —

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that —

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure

to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(f) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(g) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury,

harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(h) With respect to property ordered forfeited under this section, the Attorney General is authorized to —

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(i) The Attorney General may promulgate regulations with respect to —

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(j) Except as provided in subsection (m), no party claiming an interest in property subject to forfeiture under this section may —

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(k) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(l) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(m)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within

thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that —

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the

right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

§ 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

§ 1966. Expedition of actions

In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause action to be expedited in every way.

§ 1967. Evidence

In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings may be open or closed to the public at the discretion of the court after consideration of the rights of affected persons.

§ 1968. Civil investigative demand

(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary materials relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

(b) Each such demand shall —

(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(4) identify the custodian to whom such material shall be made available.

(c) No such demand shall —

(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

(d) Service of any such demand or any petition filed under this section may be made upon a person by —

(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f)(1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as

he shall determine from time to time to be necessary to serve as deputies to such officer.

(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for examination by the person who produced such material or any duly authorized representatives of such person.

(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such

attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

(5) Upon the completion of —

(i) the racketeering investigation for which any documentary material was produced under this chapter, and

(ii) any case or proceeding arising from such investigation, the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for

the custody and control of such material, the Attorney General shall promptly —

(i) designate another racketeering investigator to serve as custodian thereof, and

(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office and with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such

custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section.

Appendix B

The Racketeer Influenced and Corrupt Organizations Statute

WHEREAS, Congress enacted in 1970 the Racketeer Influenced and Corrupt Organizations provisions (Title IX) of the Organized Crime Control Act; and

WHEREAS, Title IX is applicable to patterns of racketeering activity involving:

1. personal violence;
2. provision of illegal goods and services;
3. corruption in private or public life; and
4. various forms of fraud; and

WHEREAS, Title IX provides important new criminal and civil sanctions to protect victims of racketeering activity, including,

1. criminal forfeiture of proceeds of racketeering activity;
2. criminal forfeiture of interests in enterprises;
3. equitable relief for the government;
4. equitable relief for victims of racketeering activity; and
5. treble damages, costs and attorneys fees for victims of racketeering activity; and

WHEREAS, twenty-two States have enacted legislation patterned after Title IX; and

WHEREAS, other States are actively considering the passage of legislation patterned after Title IX; and

WHEREAS, state and local units of government have begun to make effective use of Title IX and state legislation patterned after it; and

WHEREAS, Title IX provides important new sanctions in the area of fraud against state and local units of government; and

WHEREAS, fraud against state and local government has a multi-billion dollar annual import; and

WHEREAS, state and local units of government have found that Title IX and state legislation patterned after it are effective and essential means of redressing wrongs;

NOW, THEREFORE, BE IT RESOLVED, that the National Association of Attorneys General supports efforts by states to enact legislation patterned after Title IX and to strengthen the criminal and civil provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the National Association of Attorneys General opposes efforts to repeal or modify, in whole or in part, the provisions of Title IX, particularly in their application to public and private civil sanctions in the area of fraud against the government; and

BE IT FURTHER RESOLVED, that the Executive Director and General Counsel of the National Association of Attorneys General is authorized to transmit this Resolution to appropriate committees of Congress, the Administration, and other appropriate individuals and associations.

No. 84-648 (7)

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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Interest of *Amicus Curiae*

The Attorney General of the State of New York submits this *amicus* brief in support of the position advocated by Petitioner Sedima, S.P.R.L. ("Sedima") that this Court adhere to the plain meaning and liberal construction mandate of the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"). In submitting this brief, New York State registers its concern lest the scope and applicability of civil RICO, 18 U.S.C. § 1964(c), be unduly restricted. We adopt the reasoning and conclusions of the *amicus* brief submitted by the Attorney General of the State of Arizona and offer additional grounds in support thereof.

New York State, like other states, struggles to provide appropriate services to its citizens without imposing excessive tax burdens. Its financial resources are limited. The State and its citizens can ill afford the loss of revenues caused by the unlawful conduct RICO was designed to redress.

The State and its citizens suffer serious injury when funding for state programs is diverted, or costs thereunder are inflated, by fraud, bid-rigging schemes, bribery, kickbacks and other forms of official corruption. These losses are multiplied by ancillary expenditures for, *e.g.*, substantial numbers of additional law enforcement personnel, firefighters and emergency service employees and auditors, accountants and analysts required to investigate and handle incidents of arson, fraud and other forms of racketeering activity. Civil RICO affords state and local governments a valuable tool to recover these losses. Its treble damage remedy also serves as a powerful deterrent by making the expense of doing business through proscribed conduct prohibitive.

The State also has an interest in seeing that its citizens have the incentive and the means to seek redress when they are injured by conduct that violates RICO. Private parties injured by such conduct play an important role in the administration of justice when they are able to supplement the efforts of responsible officials by instituting appropriate private actions. Their incentive to do so should not be curtailed by decisions that vitiate their ability to recover damages from racketeering activity.

RICO is uniformly recognized by state attorneys general as a pre-eminent addition to existing legal sanctions. State and local governments have made effective use of civil RICO.[1] The Second Circuit decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (2d Cir. 1984), along with the opinion in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), severely undercuts the ability of state and local governments to use civil RICO as a means of eliminating and deterring the pernicious consequences of fraud, official corruption and other proscribed forms of racketeering activity.

Statement

The Court is respectfully referred to the brief of Petitioner Sedima for a statement of the factual background and legal proceedings below.

The petition herein raises the following questions:

1) Is a criminal conviction requisite to a private civil RICO action?

1. *See, e.g., City of Milwaukee* v. *Hansen*, Civ. No. 77-246 (E.D. Wis. 1981); *State of Maryland* v. *Buzz Berg Wrecking Co.*, 496 F. Supp. 245 (D. Md. 1980).

2) Does RICO require "something more" than, "different" or "distinct" from injury caused by the predicate acts and the unlawful engagement in an enterprise?

In our view, issues of statutory construction are necessarily implicated by the criminal conviction and distinct-injury questions. For purposes of orderly presentation, we will address that matter first and then respond to the two questions presented.

Summary of Argument

RICO was intentionally drafted in broad terms and with a mandate for liberal construction unique in federal criminal statutes. The plain language of RICO applies to a broad range of conduct, and is not susceptible to restrictive interpretations which avoid overinclusion yet preserve its key purposes.

Criminal convictions are not a prerequisite to private civil RICO suits and serve only an evidentiary function in civil actions brought by the United States. Additionally, by the plain meaning of RICO's terms, treble damages are recoverable for injury proximately caused by a confluence of a pattern of racketeering activity and unlawful participation in an enterprise.

ARGUMENT

I. RICO Is Unambiguous and Must Be Liberally Construed.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* ("RICO"), was enacted in 1970 as Title IX of The Organized Crime Control Act. It is apparently unique among federal criminal statutes in that it contains an explicit directive that it be liberally construed. Pub.L. 91-452, Section 904(a), 84 Stat. 947 (1970). Further, it is accompanied by a congressional statement of findings and purpose, 84 Stat. 923 (1970), which heralds the effectiveness of RICO's "enhanced sanctions and new weapons" in the fight against organized crime and the pervasiveness of racketeering activity.

This Court has recognized the "significance of the statement of findings and purpose[,] *United States* v. *Turkette*, 452 U.S. 576 [(1981)]," *cited* in *Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 302 (1984), and that Congress purposefully "utilized terms of breadth," in drafting the statute. *Id.* at 300. There are, indeed, no "textual pegs" on which to hang a restrictive reading. *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *petition for cert. granted*, 105 S.Ct. 902 (1985).[2]

Section 1964(c), commonly referred to as "civil RICO," provides:

> Any person injured in his business or property *by reason of a violation of section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.[3]

(Emphasis added). Petitioner raised two principal questions: first, whether a criminal conviction for RICO pred-

2. *Sedima* and *Haroco* are scheduled to be argued together before this Court.

3. Section 1961 defines the key elements under consideration as follows:

> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . . ;
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
>
> (5)"pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Section 1962 provides in relevant part:

> Prohibited activities.
>
> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section.

icates, or for a RICO violation, is a prerequisite to a civil RICO action and second, whether compensable RICO injury must be "something more" than, "different" or "distinct" from injury caused solely by the predicate acts and the unlawful use of an enterprise.

The relevant principles of statutory construction caution that the language of the statute predominates:

> "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" *United States* v. *Turkette,* 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed. 2d 246 (1981), quoting from *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.,* 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). See, also, *Dickerson* v. *New Banner Institute, Inc.,* —— U.S. ——, ——, 103 S.Ct. 986, 990, 74 L.Ed.2d 845; *Lewis* v. *United States,* 445 U.S. 55, 60, 100 S.Ct. 915, 918, 63 L.Ed.2d 198 (1980).

Russello v. *United States,* 464 U.S. 16, 104 S.Ct. 296, 299 (1983). This Court has also noted that broad general language of a statute is not ambiguous where congressional objectives require broad terms. *Diamond* v. *Chakrabarty,* 447 U.S. 303 (1980).

The language of RICO is plain on its face; the issue is not ambiguity but rather the extensiveness of the statute's applicability. We respectfully submit that proponents of a restrictive reading do not find in the legislative history the clear expression of contrary intent necessary to support their position. They fail to distinguish between legislative *debate* and legislative *intent. See, Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 203 n.24 (1976).

Initially, the court below in *Sedima* did not point to any actual statutory ambiguity,[4] but substituted a different rationale to justify culling the legislative history, stating: "The law itself calls for reference to legislative intent since the liberal construction clause states that the text should be construed to 'effectuate its remedial purpose.'" 741 F.2d at 488. Ironically, *Sedima's* review accomplishes the opposite result. In the absence of clearly expressed legislative intent contrary to RICO's plain meaning, *Sedima* finds only "[t]he clanging silence of the legislative history," *id.* at 492, to bolster its restrictive view, or relies on specific positions advocated by individual legislators during the course of lengthy congressional hearings. As Judge Pratt stated in *Furman* v. *Cirrito,* 741 F.2d 524, 533 (2d Cir. 1984), *petition for cert. filed,* October 1984:

> The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combatting organized crime. *United States* v. *Turkette,* 452 U.S. at 586-87, 101 S.Ct. at 2530-31 (1981).

(*quoting Schacht* v. *Brown,* 711 F.2d 1343, 1361 (7th Cir.), *cert. denied,* —— U.S. ——, 104 S.Ct. 508 (1984)). Particularly in light of the liberal construction mandate, this Court cannot rely on legislative silence as evidence of *Congress's* intention to read civil RICO narrowly.[5]

---

4. In its discussion of the conviction requirement, *Sedima* suggests that some of the statutory language is susceptible to a "plausible alternative view." We submit that the court is incorrect and that such "reading" of the statute is not the equivalent of statutory ambiguity. *See,* discussion, *infra,* p. 9.

5. We submit that *Sedima's* proposed principle of statutory construction, *i.e.*, "clanging legislative silence" in lieu of "clearly expressed legislative intent contrary" to a statute's plain meaning, is a

(footnote continued on next page)

II. Civil RICO Does Not Require Prior Criminal Conviction.

Sedima holds that prior criminal conviction is requisite to civil RICO actions, a proposition which *Haroco* declined to follow. We submit that this requirement does not, and should not, exist.

First, the statutory language setting forth the civil remedies nowhere requires criminal conviction as a precondition to a civil RICO action. Subsection 1964(a) provides the district court with expanded equitable jurisdiction; subsection 1964(b) authorizes United States civil suits and certain provisional remedies; and subsection 1964(c) authorizes a private right of action, recovery of treble damages and attorney's fees. None of these subsections even refers to criminal convictions. Most notably, § 1964(c) explicitly refers to injury caused by a RICO *violation.* Subsection 1964(d) does in fact make reference to criminal convictions, there denominated "final judgment or decree," not as a *requisite* of a private civil suit, but as a *method of proof* in civil cases brought by the United States. Section 1964(d) provides:

> A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

(footnote continued)

dangerous alternative. It gives courts *carte blanche* to rewrite legislation whenever they *deem* the legislative history insufficiently extensive. This produces the absurd result of forcing Congress to engage in lengthy debate in order to prevent judicial disregard for the plain meaning of statutory terms. It produces the even more absurd proposition that plain language does not control, *silence does.*

Contrary to *Sedima's* contention that the legislature did not consider the matter, Congress actually contemplated the role of criminal convictions in civil RICO suits and specifically limited their use to an evidentiary function. In the face of this explicit reference, we submit there is no "peg" upon which to hang a requirement that private civil actions be based on criminal convictions.[6]

On this crucial issue, the *Sedima* court does not claim there is statutory ambiguity but rather asserts its position as a "*plausible alternative view* of the words 'indictable' and 'chargeable' . . ." (as used in the definitions of racketering activities, 18 U.S.C. § 1961(1)), 741 F.2d at 500. (Emphasis added). This basis for substitution of judicial interpretation for legislative intent is impermissible. As Judge Cardamone suggested in his vigorous dissent, in defining racketeering activity, Congress could simply have "used the phrase 'for which an indictment or information has been *returned* or *filed*' " and could likewise have said " 'for which the defendant has been criminally *convicted.*' " 741 F.2d at 505. Simply put, " 'Congress did not write the statute that way.' " *Russello* v. *United States,* 104 S.Ct. at 300, quoting *United States* v. *Naftalin,* 441 U.S. 768, 773-74 (1979).[7]

Sedima's holding, if affirmed here, would have a seriously deleterious effect on the criminal justice system.

6. Although Congressman Mikva observed during the course of congressional hearings that "there need not be a conviction under any of these laws for it to be racketeering," 116 Cong. Rec. 35342 (1970), no member of Congress proposed an amendment which would have required criminal conviction as a requisite to private civil actions.

7. When Congress wanted to use the term "conviction," it did. *See* 18 U.S.C. § 1963(c) ("Upon conviction . . . under this section, the court shall authorize the Attorney General to seize all property or other interest . . . .")

First, victims who had been injured by RICO violations would have little recourse but to press prosecutors for convictions. Second, the conviction requirement would impose extraordinary burdens on prosecutors precisely because victims' rights would depend on their decisions. For example, convictions might be more difficult to obtain because the complainant-victim's credibility as a trial witness would be subject to attack on the ground that his ability to recover treble damages depended on conviction. Third, the victim would be unfairly affected by a decision by the government to terminate a prosecution in return for a grant of immunity or where a defendant is willing to turn State's evidence and aid the prosecutor, perhaps on entirely unrelated matters. In such a case, a victim, however severe his injuries, would remain uncompensated.

There are, moreover, many cases in which proceedings end by virtue of a procedural defect or a failure of proof. Such prosecutions might be reinstated, but the burden of doing so would unduly tax, or upset the priorities of, limited prosecutorial resources already committed to other matters. Typical examples include cases where

a) the evidence presented before the grand jury was not legally sufficient. (N.Y. Crim. Proc. Law § 210.20).[8]

b) the grand jury proceedings were legally defective because a quorum was not present; less than twelve jurors concurred in the findings of an indictment; defendant was not accorded an opportunity to appear before it; or because other reasons impaired the integrity thereof or prejudiced the defendant (N.Y. Crim. Proc. Law § 210.35).

8. The Federal Rules of Criminal Procedure and most state laws contain provisions which are identical or analogous to the New York State Criminal Procedure Law provisions referred to in subparagraphs a)- f).

c) some evidence was suppressed and witnesses who might testify to facts relating to suppressed evidence were outside the jurisdiction. (N.Y. Crim. Proc. Law § 710.20).

d) a mistrial had been declared.

e) defendant's statement was deemed "involuntary," and the prosecution decided it could not, or for some reason would not, prosecute.

f) the court lacked jurisdiction over the matter (N.Y. Crim. Proc. Law § 210.25(2)) and it had to be turned over to another prosecutor.

In all of these examples, persons injured by defendants' conduct would be entirely blameless but would be unable to alter the fact of non-conviction, irrespective of whether it resulted from prosecutorial errors or appropriate prosecutorial decisions. The connection between conviction and civil recovery should not sensibly hinge on such factors.[9]

9. *Sedima* supports this conviction requirement on yet another ground, citing the post-enactment adoption by the Department of Justice of guidelines regulating the criminal use of RICO. *See United States Attorneys' Staff Manual, Executive Office of the United States Attorneys, RICO Guidelines* (Jan. 30, 1981) ("Guidelines"). Insofar as *Sedima* contends that the conviction requirement would reflect those Guidelines, its reasoning is fallacious. The Justice Department Guidelines apply only to *federal* prosecutors and only concern the question whether they bring criminal *RICO* actions. They do not limit prosecutions for the underlying predicate acts and state prosecutors are not affected by the Guidelines.

The reference to the Guidelines raises another point. The apparent purpose of the conviction requirement is to guarantee that there are some operative guidelines for civil actions. Assuming *arguendo* that prosecutorial discretion is an appropriate criterion for limiting civil actions, the requirement of a conviction is overly restrictive. The Guidelines speak to the issue of *initiating* criminal RICO suits, an arguably more relevant inquiry, because it focuses on the proper exercise of prosecutorial discretion. A prosecution may have been properly initiated within the Guidelines, but might not have gone to conviction on innumerable grounds. *See* discussion, pp. 10-11. Because actual convictions reflect only a small number of cases in which prosecutorial discretion has been exercised in favor of the institution of criminal proceedings, it is the wrong trigger for civil actions.

The structure of RICO purposely provides alternative civil and criminal remedies for RICO violations in recognition of the differing but equally valuable results that each may provide. In some instances, ruinous treble damage recoveries aimed at making crime unprofitable may well be more effective than incarceration in curtailing racketeering activity. The linkage between conviction and civil recovery advocated by *Sedima* eliminates all possibility of utilizing § 1964 monetary sanctions where criminal proceedings end in anything less than conviction. This result cuts the heart out of the statute.

There is no indication that Congress, in forging new and powerful weapons in its attack on racketeering activity, intended to make victim recovery dependent on the vagaries of criminal proceedings. Weighed against the total absence of any congressional intent to require criminal conviction as an antecedent to civil RICO must be the problems posed by such requirement, which simply put, are devastating. In the absence of constitutional infirmity[10] and of clearly expressed legislative intent contrary to the plain meaning of the statute, this Court should reject criminal conviction as a requisite of civil actions.

10. In *United States* v. *One Assortment of 89 Firearms*, —— U.S. ——, 104 S.Ct. 1099 (1984) this Court has sustained the constitutionality of "impos[ing] both a criminal and civil sanction in respect to the same act or omission," *Sedima*, 741 F.2d at 507 (Cardamone, J., dissenting), in the face of double jeopardy (and collateral estoppel) claims after defendant was acquitted.

III. Civil RICO Does Not Require a "Distinct" or "Different" Injury.

The other issue raised by *Sedima* concerns the nature of compensable injury under civil RICO, *i.e.*, the import and scope of the phrase "injured in his business or property by reason of a violation of section 1962 . . . ." We submit that through a process of sophisticated, albeit misdirected, analysis, the Second Circuit has turned a simple statement of proximate cause into an unsupportable limitation on civil RICO recovery. In our view, § 1964(c) means just what it says and requires that plaintiff show it was proximately injured by a confluence of the predicate acts and the other elements of a RICO violation. This proposed formulation, articulated but not followed in *Bankers Trust*, 741 F.2d at 516, answers the key objection raised by petitioners in *Haroco* without precluding recovery by primary, *i.e.*, direct, victims.

Historically, RICO treble damages were modeled on the treble damage provisions of the antitrust laws, but Congress did not incorporate the civil RICO provisions in those laws because of the different purposes of the two acts and the restrictive standing requirements of antitrust cases. "[Those] concepts that were borrowed from the Clayton Act, treble damages and injunctive relief, pertain to remedies rather than what is necessary to establish a claim under RICO." *Furman* v. *Cirrito*, 741 F.2d at 531.[11] Congress borrowed the concepts but not the structure nor, as

11. *Cirrito* was the third of the so-called "trilogy" of civil RICO cases decided by the Second Circuit on successive days. It was preceded on July 24, 1984 by *Sedima* and on July 25, 1984 by *Bankers Trust*.

Sedima concedes, 741 F.2d at 503, the restrictions of the antitrust civil remedies.

In interpreting the relevant language of § 1964(c), "injured in his business or property by reason of a violation of section 1962," *Sedima, Bankers Trust* and *Haroco* posit three different tests by which a RICO plaintiff must measure whether it can claim a "RICO" injury. *Sedima* and *Bankers Trust* have enumerated tests which require "something more" than, "distinct" or "different" from injury from the predicate acts alone (the "distinct injury requirement"), whereas *Haroco* argues for a test which only requires injury from the predicate acts ("predicate act injury").

Sedima imposes

> the obligation that the plaintiff show injury *different in kind from that occurring as a result of the predicate acts themselves,* or not simply caused by the predicate acts, *but also caused by an act which RICO was designed to deter.*

741 F.2d at 496. (Emphasis added). This formulation appears to be internally inconsistent by requiring injury *different in kind* from predicate act injury yet caused by an *act which RICO was designed to deter.* It would eliminate recovery in a situation where, for example, a defendant hired two brothers to cross state lines and set fire to several buildings owned by a single individual, and where the buildings were burned to the ground. In such a case, all the elements of a RICO violation are present,[12] yet the victim cannot recover treble damages because the injury *is*

12. *See* note 15, pp. 19-20.

the injury caused by the predicate acts. Congress cannot have intended to prevent civil RICO recovery under those facts.

Sedima further explains that the type of harm it believes the statute covers occurs only when "mobsters" do business through racketeering activities:

> RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors . . . . It is only when injury caused by this kind of harm can be shown, therefore, that we believe Congress intended that standing to sue civilly should be granted.

741 F.2d at 495-96. We submit that the "mobster"-type injury is simply an attempt to revive the "organized crime" requirement rejected by the Second, Fifth, Seventh and Eighth Circuit Courts.[13]

Sedima's formulation fails for additional reasons, which are more easily described in conjunction with an analysis of the *Bankers Trust* decision. In *Bankers Trust,* plaintiff loaned money to defendants, who then engaged in a series of bankruptcy frauds and frivolous suits as a result of which Bankers was not repaid. In describing RICO injury, the Second Circuit stated:

> A civil RICO complaint must allege "a distinct RICO injury" by which we mean that it must allege a pro-

13. *Owl Construction Co.* v. *Ronald Adams Contractor, Inc.,* 727 F.2d 540 (5th Cir.), *cert. denied,* 105 S.Ct. 118 (1984); *Moss* v. *Morgan Stanley, Inc.,* 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied sub nom., Moss* v. *Newman,* 104 S.Ct. 1280 (1984); *Bunker Ramo Corp.* v. *United States Business Forms, Inc.,* 713 F.2d 1272 (7th Cir. 1982); *Bennett* v. *Berg,* 685 F.2d 1053 (8th Cir. 1981), *cert. denied sub nom., Prudential Ins. Co.* v. *Bennett,* 104 S.Ct. 527 (1983).

> prietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation.

741 F.2d at 516. The court's analysis began with an articulation of three elements: "injury to the plaintiff, causation of that injury and the conduct that caused the injury." *Id.* at 515. Noting that the plaintiff's monetary loss constituted " 'injur[y] in [its] business or property,' . . . of the type contemplated by § 1964(c)," *Id.* at 516, and that "defendant's violation" had caused plaintiff's injury within contemplation of the phrase "by reason of," *id., Bankers Trust* then opined that "the difficulty lies in the nature of the conduct that caused Bankers's injury." *Id.* Addressing this question, the court stated:

> Section 1964(c) does not provide a private right of recovery unless the conduct that caused the injury was "a violation of section 1962." We must therefore ask what conduct violates that section. Although, as detailed above, § 1962 has a number of facets, it is clear that it does not itself prohibit the predicate acts that constitute racketeering activity. Commission of two or more predicate acts is but an element of a § 1962 violation. *Indeed, § 1962 does not even prohibit a pattern of racketeering activity, without more.* Rather, there is a violation of § 1962 only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the confluence that must cause the proprietary injury.
>
> The import of this analysis is that if a complaint alleges a proprietary injury that is caused by the defendant's predicate acts, rather than by *its use of a pattern of racketeering activity in connection with a*

> *RICO enterprise,* the injury cannot be said to have been caused by "a violation of Section 1962." *See Sedima, S.P.R.L.* v. *Imrex Co.,* 741 F.2d 482 at 494 (2d Cir. 1984). . . . [A] civil RICO plaintiff must allege "a distinct RICO injury," by which we mean that it must allege a proprietary injury caused by a RICO violation not just one caused by some of the essential elements of a RICO violation.

Id. (Emphasis added, footnotes omitted) Up to this point, the court had simply articulated RICO injury, not injury different from that caused by the predicate acts and unlawful involvement in an enterprise. But the court then went astray, building on Sedima's analysis, in articulating a distinction without a difference:

> Bankers argues that it is conceptually impossible to make any distinction between injury flowing from the predicate acts and injury flowing from a pattern of racketeering activity because a plaintiff injured by the predicate acts is *ipso facto* injured by the pattern. We disagree. If a plaintiff's injury is caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be the but-for cause of the injury.

741 F.2d at 517. (Emphasis in original).

This argument builds into the law niceties surely no legislator intended, and it is unsound. There is simply no requirement in the statute that injury caused by the pattern *exclude* or *differ* from injury caused by the predicate acts. The rationale for the requirement of a pattern was simply that repeated racketeering activity[14] as opposed to a single

14. Except for collection of an unlawful debt, which requires a single occurrence for RICO culpability.

instance thereof, alone suffices for imposition of concededly strong RICO remedies. The pattern element should not be used to prevent recovery where injury from the predicate acts and injury from the pattern coalesce, so long as the other elements of a RICO violation are present.

Moreover, this argument is *reductio ad absurdum*. The plain language of the statute requires a showing of injury *by reason of the § 1962 violation* and not merely by reason of the *pattern of racketeering activity*. However, following *Bankers Trust's* logic, if plaintiff is injured by the *pattern*, he is "injured regardless of whether or not there is a [§ 1962 violation] hence he cannot be injured *by* the [§ 1962 violation] and the [§ 1962 violation] cannot be the but-for cause of the injury." 741 F.2d at 517. This formulation of "but-for" causation theory produces the absurd result of removing from the civil protection of the statute those very persons whose injuries the law was enacted to prevent.

While it is conceptually possible, in some factual circumstances, to distinguish injury from the predicate acts and injury from the pattern, it is objectionable to do so where the plain meaning of the statute does not support it and where it eliminates redress for injury caused by RICO violations. The types of injury *Bankers Trust* suggests as injury contemplated by § 1964(c) illustrate the folly of this distinction.

Having adopted *Sedima's* but-for formulation, *Bankers Trust* then sets forth examples which, in fact, depart from the rationale of its own rule. It proposes "a number of circumstances in which injury could be *attributable to a pattern but not to the individual predicate acts.*" *Id.* at

517. (Emphasis added). The first example involved cancellation of a fire insurance policy after repeated arsons and *subsequent uncompensated accidental fire damage.* The second example involved predicate acts that resulted in interruption of sales, *causing plaintiff to borrow additional funds or to take on an unwanted business partner.* Neither of the underscored events reflects injury attributable only to the *pattern* and not "to the individual predicate acts." The additional facts reflect instead injury caused by fortuitous events over which defendant had no control or occasioned by the vulnerable condition of the plaintiff. Had the fortuitous event never occurred, or had plaintiff been financially sound enough to continue without taking loans or adding partners, defendant would have escaped treble damage liability. This analysis precludes suits by primary victims, even conceding that a RICO violation has occurred, and prevents recovery for the very type of injury " 'the statute was intended to forestall,' " *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-88 (1977) *quoting Wyandotte Co.* v. *United States*, 389 U.S. 191, 202 (1967), absent other circumstances which do not themselves constitute RICO elements.

We assert that the correct interpretation of the "by reason of" language requires simply that (a) plaintiff plead and prove a RICO violation and (b) plaintiff plead and prove injury *proximately caused* by a confluence of the elements of a RICO violation, not merely by reason of the predicate acts.[15] This reading sufficiently answers the ob-

15. In this regard, *Moss* v. *Morgan Stanley, Inc.*, 719 F.2d at 17, provides analytical guidance, stating:

> To state a claim for damages under RICO a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962 (1976), commonly known as "criminal RICO." In doing so, he must allege the existence of seven constituent elements: (1) that the

(footnote continued on next page)

jection that injury must be caused by violation of § 1962 and not merely by the predicate acts set out in § 1961,[16] without thereby going beyond the purposes of RICO to require "something more," "different" or "distinct." This last requirement, often necessarily dependent on some fortuitous or unforeseeable event or circumstance, countermands established notions of proximate cause, and, ironically renders compensable some injuries which ordinary tort law would deem too remote by virtue of their foreseeability.

Additionally, it does not resolve the core complaint raised by *Sedima*—that taking RICO at *face value* results in unjustifiable federalization of "garden-variety" fraud and other state claims. Nor does it provide a line of de-

(footnote continued)

defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce. 18 U.S.C. § 1962(a)-(c) (1976). Plaintiff must allege adequately defendant's violation of section 1962 before turning to the second burden—i.e., invoking RICO's civil remedies of treble damages, attorneys fees and costs. *See Bays* v. *Hunter Savings Association*, 539 F.Supp. 1020, 1023 (S.D. Ohio 1982). To satisfy this latter burden, plaintiff must allege that he was "injured in his business or property *by reason of* a violation of section 1962." 18 U.S.C. § 1964 (c) (1976) (emphasis added).

Thus, a RICO plaintiff must first allege, and ultimately prove, all seven elements of a § 1962 violation, *i.e.*, must sufficiently prove a claim under RICO. Plaintiff's next burden is to prove injury "by reason of" that violation.

Obviously, plaintiff may fail to establish any of those elements and never reach the issue of injury. For example, in fraud cases, plaintiff may be unable to prove the criminal intent necessary for suits under the mail or wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, thus failing to prove racketeering activity. In *Moss*, plaintiffs failed to prove that the objectionable conduct relating to the underlying securities transactions was fraudulent. *Id.* at 16.

16. In this regard, we submit that *Haroco* does not go far enough, because it does not require injury from *all* of the elements of a RICO violation, as set out in *Moss*.

marcation which is any more meaningful or any more capable of discriminating between "garden-variety" and other forms of fraud than the statute itself. Rather, the distinct injury rule virtually guarantees that plaintiffs will drift even further from the purpose of RICO and engage in ever more imaginative pleading in the search for "something more," "different," or "distinct" to qualify for civil RICO recovery.

Moreover, as a practical matter, the distinct-injury requisite raises additional issues regarding a civil RICO statute of limitations. By requiring circumstances or events other than injury from the predicate acts, the distinct-injury requirement eliminates any reasoned approach to statute of limitations concerns, already an area rife with controversy,[17] and raises the spectre that any RICO offense may be turned into a continuing violation. Were the *Bankers Trust* examples followed, defendants would forever be subject to RICO claims based on fortuitous, often innocuous events which they had not set in motion and over which they exercised no control.

In sum, the distinct-injury requisite creates far more problems than it purports to resolve while eviscerating the salutary purposes for which the statute was enacted. It supplants the plain and accepted meaning of "by reason of" as a statement of causality, destroys rational expectations of recovery, and requires the subsequent occurrence of

17. *Compare, e.g., Seawell* v. *Miller Brewing Co.*, 576 F. Supp. 424 (M.D.N.C. 1981) (applying state three-year limitations period for violation based upon a liability created by statute) *with, e.g., Umstead* v. *Durham Hosiery Mills, Inc.*, 578 F. Supp. 342 (M.D.N.C. 1984) (RICO action by dissenting shareholders alleging mail fraud, wire fraud and fraud in the sale of securities governed by the two-year securities fraud limitation period or the three-year period for fraud).

unforeseeable events during some open-ended period before primary injury can be redressed—all without the merest shred of statutory or legislative support. This Court should decline to endorse a reading of this statute which so evidently creates such untoward results.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Court should grant the relief requested in the petition of Sedima, S.P.R.L. and reverse the ruling of the court below.

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APPENDIX

RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT, 18 U.S.C. §§ 1961-1964 (1978) (RICO)

(relevant portions reprinted herein)

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of il-

legal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal

law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . .

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an un-

lawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest

subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interestate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

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No. 84-648

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

SEDIMA, S.P.R.L.,
Petitioner,
v.
IMREX COMPANY, INC., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND PROPOSED BRIEF

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MOTION OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

The American Institute of Certified Public Accountants respectfully moves, pursuant to Supreme Court Rule 36.3, for leave to file a brief as *amicus curiae* urging that this Court affirm the judgment of the United States Court of Appeals for the Second Circuit. Although counsel for respondents has consented to the filing of the proposed brief, counsel for petitioner has declined to consent.

The Institute is the only national accounting association whose membership is limited to certified public accountants. The Institute has approximately 230,000 members, many of whom are regularly engaged as outside

accountants to conduct independent audits of the financial statements of business enterprises.

The Institute believes that the Second Circuit has correctly interpreted the civil RICO statute to focus the statute in the way Congress intended. Decisions by other courts, however, have allowed private plaintiffs to bring RICO charges against legitimate businesses, based on allegations that have nothing to do with the statute's intended target: organized crime.

Lower court decisions that, contrary to Congress's intention, have permitted plaintiffs to use civil RICO against legitimate business people — by threatening them with treble damages and accusing them of being "racketeers" — have fostered a severe "danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739 (1975). The danger results from the reality that "a plaintiff with a largely groundless claim" can "simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" of the lawsuit. *Id.* at 741.

Unfortunately, accountants and their firms have become one of the favorite "targets of opportunity" in civil RICO cases. When auditors express opinions on financial statements, they become exposed to suits brought by investors, creditors, and others who may claim to have relied upon those statements in making investment decisions or entering into business transactions with the auditors' clients. When corporations become insolvent, outside professionals such as accounting firms are frequently the only "deep pocket" defendants available. Although claimants often allege that outside professionals were implicated in a "scheme to defraud," these suits generally manifest the attitude that, as one class action attorney put it, "someone has

to pay" when a person "invests in a company that goes sour." Wall St. J., Jan. 28, 1985, at 30, col. 1. Members of the Institute, therefore, along with other professionals and legitimate businessmen, have a vital interest in urging this Court to adopt an interpretation of RICO that not only will dispose of the case before the Court but will do so in a manner that will bring some consistency and coherence to this misused area of the law.

The participation of the Institute is particularly important because it intends to devote its brief to supporting the Second Circuit's conclusion that a claimant may only bring a civil RICO suit against a person who has been convicted of the specified crimes listed in the statute. The respondents did not argue this position in the courts below, and we understand that no other *amicus* intends to address this ruling in any detail. In addition, the respondents and the other *amici* supporting the judgment argue that the special type of injury that a plaintiff must allege and prove under civil RICO is "racketeering injury." The Institute urges a different formulation of the proper inquiry: "competitive injury."

For these reasons, we request that the Court authorize the Institute to file the annexed brief as *amicus curiae*.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-648

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

As explained more fully in the accompanying Motion, the Institute has a particular interest in addressing the issues raised by this case. Accounting firms are often among the few "deep pockets" available in securities litigation. As a result they have become frequent targets of the increasing use of civil RICO to convert ordinary commercial and securities disputes into treble damage RICO cases. The Institute, therefore, has a special interest in urging this Court to adopt an interpretation of RICO that returns civil RICO to its intended uses, as the decision below does.

SUMMARY OF ARGUMENT

I.

A. Since RICO repeatedly refers to criminal acts as the predicates for both criminal and civil liability, the Second Circuit reasonably concluded that the statute only provides a civil remedy against persons whose multiple prior convictions make it fair to treat them as part of "organized crime." The origins and legislative history of RICO confirm that interpretation. Both the Kefauver Committee in the early 1950's and the Katzenbach Commission in the late 1970's urged Congress to strengthen the Executive Branch's law enforcement weapons to fight organized crime; neither body suggested that private lawsuits were part of the solution to the problem. Congress chose to confer broad authority upon the Executive Branch, with the expectation that the Department of Justice would channel this broad authority into a precisely-targeted law enforcement program directed at "organized crime."

B. Congress could not have intended to allow private litigants to invoke RICO without the kind of prosecutorial screening that was to be the essential mechanism for applying the statute to its intended targets. Nowhere does the legislative history suggest any intent to commission "private attorneys general." Congress understood and intended that treble damage liability would simply be another sanction visited on those members of organized crime who had been identified by public prosecutors and convicted of racketeering offenses, not a substitute for prosecution and conviction.

C. Reading civil RICO claims as dependent on a prior conviction is, as the court below recognized, the only way to be faithful to the paramount congressional goal of *protecting* legitimate business people. In the circuits that have ignored this limiting principle, private RICO suits

have not been directed at the incursions of organized crime, but at the commercial practices of the legitimate business people whom RICO was enacted to protect. Without the prior-conviction requirement, RICO would unwittingly create federal jurisdiction over, and treble damages awards for, virtually any kind of commercial or financial dispute, even one otherwise governed wholly by state law.

D. Any other interpretation of civil RICO, moreover, would raise serious doubts as to its constitutionality. RICO is unique among federal statutes because it explicitly makes the prior commission of specific crimes an essential element of civil liability. Under the Constitution, the decision to lodge an accusation of crime is the exclusive province of responsible Executive Branch officials. Only the clearest statutory language or legislative history should lead the Court to conclude that Congress intended to disregard this tradition embedded in the Constitution, but the language and history of RICO actually support the opposite conclusion.

II.

A. The language of civil RICO and the concerns expressed by its congressional sponsors evince a clear intention to create a new remedy only for one type of injury: the injury suffered by a legitimate competitor when organized crime infiltrates a business. Congress understood that the direct victims of the crimes included as RICO predicate offenses already had adequate state and federal remedies; civil RICO was designed solely to assure that the victim of racketeering competition also has a personal right to redress.

B. Congress chose to separate the RICO civil remedy from the antitrust laws simply because it did not want antitrust doctrine — especially the principle that the antitrust

laws protect "competition not competitors" — transplanted wholesale into the RICO context.

ARGUMENT

I. CONGRESS INTENDED TO ALLOW CIVIL RICO ACTIONS ONLY AGAINST PERSONS CONVICTED OF "RACKETEERING" ACTS.

RICO is one of eleven titles of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970). The other titles reflect the criminal law enforcement orientation of the statute as a whole. *See, e.g.*, 18 U.S.C. §§ 6001 *et seq.* and § 1826 (use immunity); § 3503 (pre-trial depositions in criminal cases); § 3504 (limiting motions to suppress); §§ 3575 *et seq.* (increased sentences for "dangerous special offenders"). The language of RICO (Title IX) similarly emphasizes the congressional focus on prosecuting hard-core criminals. Since the RICO title repeatedly refers to criminal acts as the predicates for both criminal and civil liability, the court below reasonably concluded that, even on the face of the statute, Congress manifested its intent to focus the new civil remedy only on persons whose multiple prior convictions identify them as part of "organized crime."

Moreover, beyond the language of the statute, the Court should "look to the objectives Congress sought to achieve. . . . " *United Steelworkers* v. *Sadlowski*, 457 U.S. 102, 111 (1982). The Second Circuit believed that the legislative history "gives little hint of the intended scope of private action under civil RICO." 741 F.2d at 488. The Seventh Circuit, in the companion case now before the Court, disagreed with the Second Circuit's result because it viewed the legislative history as indicating that "Congress

deliberately chose the very broad language of RICO's provisions." *Haroco* v. *American National Bank & Trust Co.*, 747 F.2d 384, 390 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (Jan. 15, 1985). Both courts, however, misperceived the legislative history that illuminates Congress's limited intent in providing the *private* remedy. The Seventh Circuit, like some other courts that have felt constrained to accord civil RICO an expansive sweep, mistakenly seized on comments about the need to give public prosecutors broad criminal enforcement powers; it erroneously assumed that Congress intended to delegate equally open-ended discretion to private claimants. In fact, however, Congress intended that the private civil remedy would play a much more modest — indeed, incidental — role under the statute. The legislative history confirms the soundness of the result that the Second Circuit reached on the basis of textual exegesis.

A. Congress Intended That the Executive Branch Would Insure That RICO's Broad Authority To Attack "Organized Crime" Is Precisely Targeted.

Congressional concern about organized crime came alive in the 1950's when the special Senate committee chaired by Senator Estes Kefauver held hearings and issued a report on organized crime. *See* S. Rep. No. 307, 82d Cong., 1st Sess. (1951). Nearly two decades later, the President's Commission on Law Enforcement and Administration of Justice, chaired by Attorney General Katzenbach, renewed the alarm. Both the Kefauver Committee and the Katzenbach Commission recommended that Congress strengthen law enforcement weapons to deal with organized crime. Significantly, however, neither body suggested that private lawsuits were part of the solution to the problem.

The Kefauver Committee recommended additional crime legislation and prosecutorial action at the federal and

state levels. *See* S. Rep. No. 725, 82d Cong., lst Sess. 6-11 (1951). The Katzenbach Commission recommended "a national strategy against organized crime," which was to consist of specific changes in the system of criminal justice, including expanded grand jury powers, a general witness immunity statute, legislation authorizing electronic surveillance, longer sentences for participating in a "continuing illegal business," and protection for witnesses in organized crime cases.[1]

The Katzenbach Commission report spurred enactment of two multi-faceted law enforcement measures, the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), and the Organized Crime Control Act of 1970, *supra*. The 1968 statute authorized electronic surveillance; the 1970 statute addressed most of the Commission's other recommendations.

Some of the legislative proposals that immediately followed the Katzenbach report attempted to define and outlaw "organized crime". For example, in the 90th Congress, Senator John McClellan (author of the bills that were eventually combined to form the Organized Crime Control Act of 1970) introduced S. 678, 90th Cong., 1st Sess. (1967), a bill to "outlaw the Mafia and other organized crime syndicates." The bill would have made it a crime to become a member of "the Mafia" or "any other organization" having as one of its purposes the violation of the criminal laws "relating to gambling, extortion, blackmail, narcotics, prostitution, or labor-racketeering."

Congress, however, did *not* follow that approach in drafting the Organized Crime Control Act of 1970, since it was concerned that any attempt to define "organized crime" might unconstitutionally create a "status" crime. *See, e.g.,*

1. President's Commission on Law Enforcement and Administration of Justice, *The Challenge Of Crime In A Free Society* 190, 200-204 (1967).

116 Cong. Rec. 35,343 (remarks of Rep. Celler); *id.* 35,344 (remarks of Rep. Poff) (1970). Instead, Congress conferred broad authority upon the Executive Branch to exercise discretion to identify and prosecute racketeers. Congress defined the term "racketeering activity" to include a long list of federal and state crimes as diverse as murder, kidnapping, arson, and mail fraud. *See* 18 U.S.C. § 1961(1). The list of what could be branded as "racketeering activity" was made quite broad, because, as Senator McClellan observed, organized crime had shown great flexibility in branching into additional illegal activities, and "if we name one crime, they will commit another." Narrowing the list, it was feared, would only create a "loophole" into which organized crime would move. Congress, the Senator explained, could not "anticipate everything"; it would "have to make a statute general." 116 Cong. Rec. 845-46 (1970).

Nevertheless, Congress expected the Department of Justice to channel this broad authority into a precisely-targeted law enforcement program directed at "organized crime," as experienced prosecutors understand that concept. This point was made, for example, in a colloquy between Senator McClellan and the Deputy Staff Director of the Katzenbach Commission, Henry Ruth:

> "Senator McClellan: . . . I note that you say that while S. 30 is aimed at organized crime it has a general application to the criminal justice system. Do you think there is any practical way in which we can limit its application to organized crime?
>
> "Mr. Ruth: Legislatively no, sir; *I think, administratively you can.* The difficulty is in drawing up the statutes aimed at organized crime, as you are probably aware of, as much as anyone in the country — you have drafted statutes in the past trying to define organized

crime as a crime — and it has been very difficult on a constitutional basis." (Emphasis added.)[2]

Similarly, the former Chief of the Organized Crime and Racketeering Section of the Justice Department's Criminal Division, William Hundley, testified that the authority being conferred was "very broad" and would have to be "very selectively used." When Senator McClellan asked, "How could you write into the statute a provision that would compel this sort of selective use?", Hundley responded, "I don't think there's any way. *I think you're going to have to rely on the Justice Department.*" Senate Hearings 424 (emphasis added).

Thus, Congress chose an approach that is familiar in crime legislation: entrusting broad statutory authority to Executive Branch discretion. Senator McClellan himself later explained that prosecutorial screening was the key to assuring that the broad new authority would only be used against "organized crime" figures. *See* McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 144 (1970).

The Justice Department has implemented the congressional design by promulgating rules to insure that the broad authority that Congress conferred is used only against career criminals — members of "organized crime" as experienced prosecutors recognize them. The overriding policy set forth in the Justice Department "RICO Guidelines," incorporated in the *United States Attorneys' Manual*, §§ 9-110.200 through 9-110.413, is that RICO is to be used "selectively" and that "not every case in which technically the elements of a RICO violation exist will result in the

2. *Measures Relating To Organized Crime: Hearings Before the Subcomm. on Criminal Laws And Procedures of the Senate Comm. on The Judiciary*, 91st Cong., 1st Sess. 346-47 (1969) ["Senate Hearings"]. The provisions in S. 30 being discussed were the RICO provisions that the Senate Judiciary Committee eventually reported out as part of the Organized Crime Control Act.

approval of a RICO charge." *United States Attorneys' Manual*, § 9-110.200 at 9 (March 9, 1984).

The Justice Department's responsibility to exercise expert discretion has played a major role in the broad interpretations of RICO that the Department has sought and received from the courts. For example, when this Court was considering *United States* v. *Turkette*, 452 U.S. 576 (1981), the Department assured the Court that no "extreme cases" would be brought under RICO, because the Department would exercise "sound discretion" through the Criminal Division's centralized review process. *See* Brief for the United States at 25 n.20.

B. Congress Intended Private RICO Claims To Be Incidental To Government Prosecutions.

Neither the Kefauver Committee, nor the Katzenbach Commission, nor the sponsors of the 1970 Organized Crime Control Act viewed private lawsuits as an important additional weapon against organized crime. Rather, the basic congressional plan was to delegate to experienced prosecutors the responsibility for selecting appropriate targets for criminal RICO enforcement. Congress, therefore, could not have intended to allow private litigants to invoke RICO without the kind of prosecutorial screening that was to be the essential mechanism for applying the statute to its intended targets. That is why absolutely no voice was heard in Congress to suggest that a private plaintiff might be able to dress up a securities case, a product liability suit, or a common law commercial dispute and have it masquerade as a RICO "racketeering" claim.

1. RICO as passed by the Senate authorized only government enforcement.

RICO first passed the Senate in 1970 as part of S. 30, 91st Cong., 2d Sess. (1970), sponsored by Senator McClellan, the chairman of the Senate Judiciary Committee, which

reported the bill. *See* S. Rep. No. 617, 91st Cong., 1st Sess. 83 (1970) ["Senate Report"]. In contrast to some other anti-racketeering proposals, the McClellan bill authorized only government enforcement and made no provision for private remedies. *See* 116 Cong. Rec. 972 (1970). The only civil remedies were injunctions that the Justice Department alone could seek.

The omission of private remedies was no accident. Another bill, S. 1623, 91st Cong., 1st Sess. (1969), introduced by Senator Hruska, had included proposals to authorize private suits against racketeers. Indeed, petitioner and their *amici* emphasize Senator Hruska's explanation of the relative importance of civil remedies under *his* bill (Pet. Br. 17; Arizona Amicus Br. 9 n.14). They neglect, however, to point out that neither the Judiciary Committee nor the Senate accepted Senator Hruska's approach. Instead, as the Senate Report explained, the bill actually reported and passed "was the product" of "careful efforts" to cull the basic elements from various proposals. Senate Report 83. The RICO provisions adopted by the committee originated in S. 1861, 91st Cong., 1st Sess. (1969), which Senator McClellan had sponsored; unlike S. 1623, it did not authorize any private remedies. The bill as marked up and reported, S. 30, thus contained no provision at all for private enforcement.[3]

Moreover, even the government's civil remedies under S. 30 were to supplement rather than displace criminal prosecutions. The proposed section on "civil remedies" contained language providing that a criminal conviction would "estop" the defendant "in any subsequent civil proceeding

3. A comparison of the two bills, reprinted at Appendix B (S. 1623) and Appendix C (S. 30), *infra*, shows that Senator Hruska's approach was primarily to create a new civil remedy where none existed, whereas the Senate bill relied exclusively on public enforcement through criminal, injunctive, and forfeiture proceedings.

brought by the United States" (proposed § 1964(c)). Senator McClellan explained that it was not enough merely to prosecute, convict and "imprison individual mob members." 116 Cong. Rec. 591 (1970). Instead, the "civil remedies" were to bring about "wholesale removal of organized crime from our organizations, prevention of their return and, where possible, forfeiture of their ill-gotten gains." *Id.* Thus, civil remedies were not to supplant criminal prosecution; they were to be available if the prosecutors concluded that a sanction *beyond* conviction was appropriate.

The Senate debates on the organized crime bill recognized that organized crime victimizes many Americans. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska); *id.* 585-86 (1970) (remarks of Sen. McClellan); 115 Cong. Rec. 17,504 (1969) (remarks of Sen. McClellan); *id.* 36,988 (1969) (remarks of Sen. Scott). Yet, the Senate proposed to aid the victims of organized crime, not by authorizing a flood of private litigation, but by giving law enforcement authorities powerful new resources to discharge *their* responsibility for leading the fight against organized crime.

2. When the House added a private treble damage remedy, it did not intend to deputize "private attorneys general" to act where prosecutors had not.

The House Judiciary Committee, after hearings, reported the Senate-passed bill with a number of amendments. The dominant theme of the committee's action was to refine rather than to enlarge the Senate bill:

> "The Committee's principal aim has been to eliminate provisions vulnerable to constitutional objections and to revise sections deemed to be unworkable so that the legislation will withstand future court challenge." H.R.

> Rep. No. 1549, 91st Cong. 2d Sess. 32 (1970) ["House Report"].

The House committee made only one change to the "civil remedies" section of the RICO title; it added the language now found in § 1964(c) authorizing private treble damage suits. Vividly illustrating its view that this addition did not alter the essential nature of the bill, the committee's report devoted only a single, bland sentence to the new provision:

> "The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured." House Report 35.

In the House debates that led to passage of the bill as reported, the Members gave scant attention to this aspect of the bill. Instead, the debate was dominated by controversy over the breadth of the enforcement powers being conferred upon the government, not only in Title IX but in other provisions as well. *See generally* 116 Cong. Rec. 35,191-217, 35,287-363 (1970).

Although some courts and commentators have characterized the private RICO remedy as authorizing "private attorneys general" to supplement prosecutorial enforcement, nowhere in the legislative history did any Member of Congress advert to such an intent. Congress evidently did not believe that *autonomous* private enforcement was either necessary or realistic. Indeed, as subsequent history has dramatically illustrated, Congress would have been remarkably naive to have believed that a private citizen would have the temerity to move against a real organized crime figure *unless* the government had first prosecuted and convicted him. Instead, the limited purpose of adding a private remedy was to provide direct, personal financial relief for certain victims of organized crime whose interests the government did not fully redress *merely* by indicting and convicting the

racketeers. This sharply-defined focus emerges from the structure of the final bill.

First, the House-amended version added the civil RICO provision to Title 18 of the United States Code, which had never authorized independent private actions to enforce its general criminal prohibitions. The RICO treble damage provision was not codified in Title 15 or elsewhere, as a true "private attorney general" statute might have been.

Second, although the House added a private treble damage remedy, it did not adopt any of the related pending proposals that would have created mechanisms for independent private suits. The House committee considered S. 1623, Senator Hruska's original bill, and its companion House bill, H.R. 9327, 91st Cong., 1st Sess. (1969), which had been introduced on the same day by Representative Poff, one of the ranking minority members of the House Judiciary Committee. Those bills (*see* App. B, *infra*) not only contained provisions authorizing private treble damage actions but also included elaborate machinery for private enforcement. Significantly, the House Judiciary Committee tagged onto the criminal RICO title *only* the bare language creating a private treble damage action, and not the other proposals for free-standing private enforcement.

Third, when the House debated the amended bill, both the bill as a whole and its RICO title were viewed as a criminal law enforcement measure. Absent from the House report or the House debates was any notion that the new version of the bill had revolutionized the enforcement plan and allowed private claimants to identify "organized crime" targets by bringing civil suits unharnessed to a government prosecution. Even though the role of the "private attorney general" under the antitrust laws was well established by that time, no one characterized the private RICO remedy in that way.

Instead, criminal prosecutions directed by experienced Justice Department prosecutors remained the core of the bill. Thus, the Judiciary Committee Chairman, Representative Celler, described the bill as intended "to curb organized crime by strengthening the Federal criminal justice system." 116 Cong. Rec. 35,196 (1970). And Representative St. Germain described how the bill would be applied to its intended targets: "law enforcement officials know who the racket leaders are . . . ." 116 Cong. Rec. 35,200 (1970). Members of Congress, therefore, must have understood that private damage actions would be brought only against persons whom law enforcement officials had identified, prosecuted and convicted of the racketeering acts listed in the statute.[4]

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4. Petitioner (Pet. Br. 17) and its *amici* rely on the unsupported comment by Rep. Mikva, 116 Cong. Rec. 35,342 (1970), that "there need not be a conviction under any of these laws for it to be racketeering." Rep. Mikva, however, was opposed to any private civil remedies under this bill and his comments do not reflect congressional intent. When he included this assertion in his list of reasons for opposing the provision, no one saw fit to comment on it. Indeed, Rep. Mikva's remarks were made to a virtually empty chamber, as the vote on his amendment, taken immediately after his statement, demonstrates. *See* 116 Cong. Rec. 35,343 (only 67 votes cast). In contrast, when the House voted to approve the bill later in the day, 367 representatives participated. *Id.* at 35,363. Thus, not only should Rep. Mikva's comments be discounted because he was an avowed critic of the private remedy provision, *see* 741 F.2d 490 n.22, but the remarks were delivered without even a quorum of the House present, and the final vote was taken before his remarks were even published, let alone read.

Furthermore, Rep. Steiger, who had urged the House Judiciary Committee to include a treble damage remedy, had commented to the House that under the bill as reported the "relationship between proceedings brought by the United States and proceedings brought by private plaintiffs" was a "complex and subtle" matter. 116 Cong. Rec. 35,227 (1970). His statement was far more equivocal than that of Rep. Mikva. Rep. Steiger had recommended a package that would have expanded civil remedies for both the government and private persons (such as treble damage actions by the United States and equitable remedies for private persons). *Organized Crime Control: Hearings on S. 30 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 520-21 (1970) ["House Hearings"]. The Judiciary Committee, however, did not incorporate this package. When he offered the package again as a floor amendment, Rep. Poff persuaded him to withdraw it for possible consideration by a later Congress. 116 Cong. Rec. 35,346-35,347 (1970).

Finally, when the House-amended bill returned to the Senate, Senator McClellan, after examining it "with some care," characterized the House amendments as "minor changes" and moved that the Senate immediately agree to them. 116 Cong. Rec. 36,293 (1970). The Senate promptly adopted the House version. 116 Cong. Rec. 36,296 (1970).

Thus, Congress understood and intended that treble damage liability would simply be another sanction visited on those members of organized crime whom public prosecutors have identified and have convicted on racketeering offenses, not a *substitute* for prosecution and conviction. If members of Congress had contemplated a broader, "private attorney general" role for private plaintiffs, they surely would have addressed this concept specifically. They also would have examined the potential effect of eclipsing other federal and state causes of action and bringing a large volume of new litigation into the federal courts. This Court should not assume that Congress's failure to consider all those consequences was merely short-sighted, as some lower courts have suggested, but should infer that Congress understood that the private civil RICO remedy would come into play only after the government has selected appropriate "organized crime" targets. *Cf. Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 377 (1982) (explaining that the Court has become less willing to assume Congress intended to create new private rights of action, because "the increased volume of federal litigation strongly support[s] the desirability of more careful scrutiny of legislative intent").

C. Unless The Statute Is Interpreted As The Second Circuit Did, Private RICO Actions Will Continue To Be Misused To Cause Consequences Never Intended By Congress.

As this Court has recognized, "the major purpose" behind RICO was "to address the infiltration of legitimate

business by organized crime," a point that was "made time and again during the debates and in the hearings before the House and Senate." *United States* v. *Turkette*, *supra*, 452 U.S. at 591. Today, however, private plaintiffs in most circuits have twisted RICO to pursue objectives completely contrary to the congressional goals. Private RICO suits have been directed, not at infiltration by organized crime, but mainly at the commercial practices of the legitimate business people that RICO was enacted to protect. This phenomenon has been accompanied by an attempt to secure federal jurisdiction over, and treble damages awards for, virtually any kind of financial dispute, even one otherwise governed wholly by state law. Reading civil RICO claims as dependent on a prior conviction is, as the court below recognized, the only way to be faithful to the overarching congressional goal of *protecting* legitimate business people.

1. Almost all private RICO actions have been brought against legitimate business, the intended beneficiary of RICO.

Of the reported private RICO cases, there have been only a few involving the kind of law enforcement problem at which RICO was aimed. For instance, in *Anderson* v. *Janovich*, 543 F. Supp. 1124 (W.D. Wash. 1982), a tavern owner alleged that competitors had tried to control the local tavern business through threats of murder and arson. In *Anderson*, however, as in virtually all of the other civil RICO suits against violent criminals, the private suit *followed* criminal prosecution and conviction, as Congress had assumed. *See also State Farm Fire and Casualty Co.* v. *Estate of Caton*, 540 F. Supp. 673 (N.D. Ind. 1982) (arson fraud); *Milwaukee* v. *Hansen*, 77-C-246 (E.D. Wis. Jan. 13, 1981) (arson).

By far the vast majority of private RICO actions, though, have attacked legitimate businesses, under circumstances that would not lead a public official even to consider

filing a criminal charge. Instead, the plaintiffs raise the stakes in commercial disputes by alleging that the defendants' business activities involved a "scheme to defraud" in violation of the securities or mail fraud statutes, thereby manufacturing a RICO case. The recent report of a special American Bar Association Task Force appointed to study civil RICO illustrates the use of RICO to transmogrify business tort and contract cases. The task force comprehensively surveyed reported and unreported civil RICO cases and classified the essential allegations as follows:

Percentage	Underlying Allegation
40%	securities fraud
37%	common law fraud in a commercial setting
4%	antitrust or unfair competition
4%	bribery or commercial bribery
3%	other fraud
2%	labor disputes
1%	theft or conversion
9%	offenses generally associated with professional criminal activity

See Report of ABA Special Task Force on Civil RICO 53-54 (1985).

As the figures suggest, these suits are not directed at gangsters and racketeers. The most extensive use of private RICO has been in disputes involving securities trading, such as disputes between a broker-dealer and a customer, and in actions alleging false statements or nondisclosures in SEC filings or public announcements.[5] RICO allegations are now

5. *See, e.g.*, *Schacht* v. *Brown*, 711 F.2d 1343 (7th Cir.), *cert. denied*, 104 S. Ct. 508 (1983); *In re Data Access Systems Securities Litigation* 1 RICO Lit. Rep. 641 (D.N.J. 1984); *Harper* v. *New Japan Securities International, Inc.*, 545 F. Supp. 1002 (C.D. Cal. 1982); *Noland* v. *Gurley*, 566 F. Supp. 210 (D. Colo. 1983).

also becoming an accepted tactic in tender-offer litigation.[6] RICO allegations are thus being used to overcome the "carefully crafted" limitations that govern the express and implied remedies under the federal securities laws. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 195, 206-211 (1976). RICO allegations also appear in other commercial contexts, such as suits against banks over the correct rate of interest, and disputes in commercial real estate transactions.[7]

Private claimants, in sum, have used civil RICO to charge dozens of investment banking and brokerage firms, national accounting firms, banks, law firms, insurance companies, and manufacturing companies with engaging in "patterns of racketeering" in violation of this "organized crime" statute. (Many of these institutions are listed in Appendix A, *infra*.) Thus, civil RICO has become, in some circuits, "the ultimate weapon in business and commercial litigation." ABA Section of Litigation, *RICO: The Ultimate Weapon In Business and Commercial Litigation* (1983).

2. RICO has been used to "federalize" state common law torts and commercial disputes.

The use of RICO by private plaintiffs to attack legitimate business not only burdens the respected institutions that must defend charges of racketeering; it also burdens the federal courts. Virtually any dispute today arises from a background of events in which the mail or the telephone was used. By invoking the mail fraud or wire fraud predicates of

6. *See, e.g., Dan River, Inc.* v. *Icahn*, 701 F.2d 278 (4th Cir. 1983); *Gearhart* v. *Smith International Inc.*, 592 F. Supp. 203 (N.D. Tex.), *modified*, 741 F.2d 707 (5th Cir. 1984).

7. *See, e.g., Morosani* v. *First National Bank of Atlanta*, 703 F.2d 1220 (11th Cir. 1983); *Battlefield Builders, Inc.* v. *Swango*, 743 F.2d 1060 (4th Cir. 1984).

RICO, private plaintiffs are able to invoke federal jurisdiction over disputes that have been the exclusive province of the state courts.[8]

The need to allege "fraud" presents no real obstacle. In affording the government wide latitude to prosecute under the mail fraud statute, the lower federal courts have indicated that the statute "condemns conduct which fails to match the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing in the general and business life of members of society.'" *Blachly* v. *United States*, 380 F.2d 665, 671 (6th Cir. 1967) (quoting *Gregory* v. *United States*, 253 F.2d 104, 109 (5th Cir. 1958)).[9] Hardly a commercial dispute exists in today's world in which one side does not believe that the other failed to engage in "fair play and right dealing." At the very least, allegations of this sort survive preliminary dismissal motions and thus set the stage for coerced settlements. In the circuits that allow plaintiffs to pursue civil RICO claims against persons who have never been convicted of crimes, therefore, litigious

8. For example, in *Maxwell* v. *Southwest National Bank*, 1 RICO Lit. Rep. 612 (D. Kan. 1984), a private RICO plaintiff is alleging that the defendants committed mail and wire fraud to deprive him of his inheritance. Similarly in *Erlbaum* v. *Erlbaum*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. July 13, 1982), the RICO claim was based upon allegedly fraudulent correspondence between estranged spouses "during negotiation of a property settlement." Personal injury claimants have alleged mail fraud for "RICO-ized" products liability actions, *see In re Dalkon Shield Litigation*, 1 RICO Lit. Rep. 629 (S.D. Ohio 1984), and complaints alleging wrongful discharge from employment have been filed as RICO actions. *Callan* v. *State Chemical Mfg. Co.*, 584 F. Supp. 619 (E.D. Pa. 1984).

9. To the same effect, *see, e.g., United States* v. *Curry*, 681 F.2d 406, 410 (5th Cir. 1982). *See also* Coffee, *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 149 (1981).

plaintiffs encounter few constraints in urging that their grievances fall within an elastic concept of "fraud."[10]

The advocates of using civil RICO in ordinary commercial disputes assert that Congress recognized that the fraud-based predicates would have a broad impact on civil litigation. There is, however, not a shred of support for this argument; all of the references to RICO's breadth dealt with its *criminal* provisions. There was simply no discussion of possible overlap with existing federal *civil* remedies or the possible "federalization" of local civil disputes as a result of including various fraud predicates, and certainly no intent to achieve those consequences. The Senate added securities, wire, and mail fraud to the bill's list of predicates at the suggestion of the SEC's Division of Enforcement because organized crime figures had begun to engage in market manipulation and securities theft. The SEC officials recommended the changes when they understood the legislation would provide for only government, not private, remedies. They believed that RICO could serve as an important weapon for *government* enforcement against those activities. *See* ABA Civil RICO Task Force Report, *supra*, at 97-98 n.130. When the House later added the private civil remedy, no one suggested that the fraud predicates were intended either to be superimposed on other private remedies for fraud or to federalize local commercial disputes.

10. The mail fraud and wire fraud statutes are not the only bases upon which private plaintiffs have used RICO to federalize local disputes. Recently, the Fourth Circuit reinstated a RICO treble damage action brought by a condominium developer who alleged that purchasers of an office condominium unit were trying to "extort" an unreasonably high price in connection with his effort to repurchase the condominium unit in order to include it in a block of units the developer wanted to sell to IBM. *See Battlefield Builders, Inc.* v. *Swango*, *supra*, 743 F.2d 1060.

D. Since Public Prosecutors Have Exclusive Constitutional Discretion To Accuse A Person Of A Crime, Civil RICO Must Be Interpreted As Requiring That The Criminal "Racketeering" Element Rest On A Prior Conviction.

Under the Constitution, the decision to lodge an accusation of crime is the exclusive province of responsible Executive Branch officials. There would be serious doubts about RICO's constitutionality, therefore, if RICO authorized private plaintiffs to invite federal courts and juries to find that persons had committed crimes with which public prosecutors had not successfully charged them. Since a court is to interpret a statute in a way that avoids "a serious doubt of constitutionality," *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979), this Court should construe civil RICO as making a prior conviction a prerequisite to a private civil RICO suit.

When other federal statutes provide both criminal penalties and private civil remedies, guilt of a crime is not an essential element of the civil claim. Of course, the same conduct may give rise to both criminal and civil exposure, but under statutes other than RICO a plaintiff need not allege and prove the actual commission of a crime in order to show his right to civil redress. *See generally* W. Prosser & P. Keeton, *Torts* 7-9 (5th ed. 1984). The federal antitrust laws, to which RICO is sometimes analogized, illustrate this distinction. Civil liability may rest on the same *conduct* that also may give rise to criminal exposure, but nothing in the antitrust laws makes the defendant's commission of a crime a specific and essential element of a civil claim.[11]

11. The standards for criminal and civil liability under the antitrust laws actually differ, even though both claims rest on the same statute. *Compare United States* v. *United States Gypsum Co.*, 438 U.S. 422, 434-46 (1978), *with American Society of Mechanical Engineers, Inc.* v. *Hydro-level Corp.*, 456 U.S. 556, 565-74 (1982). *See* 2 P. Areeda & D. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 310 (1978).

RICO, by contrast, is unique among federal statutes because it explicitly makes the prior commission of specific crimes an essential element of civil liability. As the Seventh Circuit itself acknowledged in the companion case, "RICO liability must be based, after all, on findings of criminal conduct." *Haroco* v. *American National Bank* , *supra*, 747 F.2d at 404. Petitioner, therefore, simply misses the point in asserting (Pet. 27) that Congress "has used the statutory scheme of civil proceedings *in the context* of criminal statutes with regularity" (emphasis added).[12]

Congress, of course, has great flexibility in deciding whether to authorize the government to attack misconduct with civil or criminal remedies, or both.[13] The issue here, however, is not whether Congress may subject misconduct to both criminal and civil sanctions or whether it may authorize the Department of Justice to choose between alternative methods of enforcement. Rather, the issue is whether Congress may transfer to private claimants the power to press explicit charges of criminal conduct that no public prosecutor has decided to level.

The Constitution does not permit Congress to delegate that power to private claimants. Under Article II of the Constitution, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case. . . . " *United States* v. *Nixon*, 418 U.S. 683, 693

12. Amicus knows of no other federal statutes in which civil remedies are predicated on alleging and proving that the defendant committed a crime. The one "example" cited by petitioner (Pet. 27) is a recent amendment to the Lanham Act, but Section 1503(2) of P.L. 98-473, from which the petitioner quotes, merely sets treble damages as the remedy for infringement of the Act's civil provisions, without regard to possible criminal violations. *See* 15 U.S.C. § ..14(1).

13. *See, e.g., United States* v. *Ward*, 448 U.S. 242 (1980); *In re Debs*, 158 U.S. 564 (1895); *United States* v. *Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (upholding government's civil RICO remedies).

(1974). Since the constitutional separation of powers assigns exclusively to executive officials the "discretionary power" to decide "whether a prosecution shall be commenced or maintained," neither private persons nor the federal courts themselves may charge a person with a crime that a prosecutor has not alleged. *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 935 (1965). As the court held in *Cox*, there simply can be no charge of crime in a federal court, even by a grand jury, unless the Executive Branch affirmatively decides to initiate and press it. *See, e.g., Mariscal* v. *United States*, 449 U.S. 405 (1981).

The government's exclusive control over criminal charges is a hallmark of our notion of fundamental fairness. As this Court has explained, a public prosecutor, unlike a private lawyer representing a private client, is not the representative "of an ordinary party to a controversy" but is "the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer." *Berger* v. *United States*, 295 U.S. 78, 88 (1935). "A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court." *Imbler* v. *Pachtman*, 424 U.S. 409, 424 (1976). The ABA Standards for Criminal Justice, therefore, explicitly state that "the prosecution function should be performed by a public prosecutor. . . . " Standard 3-2.1, I *ABA Standards For Criminal Justice* (2d ed. 1980) at 3.12. The "participation of a responsible public officer" who is accountable for his judgments "gives greater assurance that the rights of the accused will be respected" when the momentous decision is made to accuse a person of crime. *Id.* (commentary).

Serious abuses are actually occurring in circuits that allow private RICO plaintiffs to accuse defendants of crimes when they have not been convicted of anything. Prosecutors

would rarely find any prosecutive merit in these accusations. As one survey of private civil RICO cases concluded:

> "[R]ealistically speaking, the likelihood of state or federal prosecutors seeking indictments in the vast majority of these types of cases is as close to zero as anything could be." Weissman, *Circuit Aims to Curb Private Civil RICO Actions*, Legal Times, Aug. 20, 1984, at 12.

Some of RICO's predicate offenses are so broad that they presuppose the exercise of prosecutorial discretion. For instance, the mail fraud statute's enforcement of public notions of "moral uprightness" and "fair play," *see Blachly* v. *United States*, *supra*, 380 F.2d at 671, is too sweeping a basis for a private accusation of crime if it is freed from "the constraints of prosecutorial discretion and guidelines which limit its application in the criminal sphere . . . ." Rakoff, *RICO Litigation Rep.* 206 (September 1984).[14]

This Court already has held that certain constitutional rights applicable in criminal cases also apply in quasi-civil cases "requiring the determination that the criminal law has been violated. . . . " *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 701 (1965) (forfeiture). Since RICO is "intended to impose a penalty only upon those who are significantly involved in a criminal enterprise," and only

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14. Apart from RICO, therefore, the federal courts have consistently refused to treat this "bare criminal statute" as implying a private civil right of action even for single damages. *E.g.*, *Ryan* v. *Ohio Edison Co.*, 611 F.2d 1170, 1178 (6th Cir. 1979).

In another context, the Court has decided that the danger of allowing private parties to enforce a broad criminal statute implied that Congress did not intend to give private parties the enforcement authority entrusted to public officials. *Compare United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29 (1963), where the Court held that § 3 of Robinson-Patman Act is not unconstitutionally vague for criminal enforcement purposes, *with Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 378-79 (1958), where the potential for abuse of that vague provision led the Court to infer that Congress did not intend to allow private enforcement. *See* 2 Areeda & Turner, *supra*, § 311b at 33 n.7.

"by reason of offences committed" by them, *cf. United States* v. *United States Coin and Currency*, 401 U.S. 715, 718, 721-22 (1971), the fact that a RICO treble-damage claim is formally a "civil" proceeding does not strip defendants of their constitutional right to prosecutorial screening and proof beyond a reasonable doubt before a federal court is asked to brand them as criminal racketeers. *Cf. In re Gault*, 387 U.S. 1, 49-56 (1967).

Only the clearest statutory language or legislative history should lead the Court to conclude that Congress intended to disregard the sound tradition, embedded in the Constitution, that public prosecutors have exclusive authority to charge a person with crime. The text of RICO does not require that troublesome conclusion, and the legislative history shows that Congress was actually striving to avoid any constitutional issues. *See*, *e.g.*, House Report 32; House Hearings 519 (remarks of Rep. Steiger). Therefore, the Court should avoid a serious constitutional question by construing civil RICO as applying only where there have been prior convictions on the predicate crimes.

II. THE ONLY TYPE OF INJURY THAT CONGRESS MADE ACTIONABLE UNDER CIVIL RICO IS INJURY FROM UNFAIR COMPETITIVE PRACTICES FOR WHICH NO EFFECTIVE REMEDY HAD PREVIOUSLY EXISTED.

A. Section 1964(c) Was Intended Only To Create A Remedy, Which Congress Thought Was Lacking, For Certain Unfair Competitive Practices.

When the House added the private treble damage remedy, it adopted the language from one of the sections of the Hruska bill, S. 1623. *Compare* 18 U.S.C. § 1964(c) *with*

section 4(a), App. B at 6a, *infra*. Senator Hruska's description of the people in the zone of intended protection, therefore, should be most persuasive in deciding what kind of injury was to be covered by the language that he drafted.[15]

In introducing his bill, Senator Hruska described its limited criminal provisions and then explained why he had added private civil remedies:

> "[T]he bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Antitrust Act to organized crime activities, as a practical matter the legitimate businessman does not have adequate civil remedies available under that Act. This bill fills that gap." 115 Cong. Rec. 6993 (1969).

Although his committee reported a bill without any private remedy, the committee shared his concern about the fate of competitors when racketeers, "using force and fear," attempt "to secure a monopoly" in a line of business (Senate Report 77):

> "When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses. Competitors can thus be effectively eliminated and customers can be effectively confined to sponsored suppliers." *Id.*

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15. The court below indicated that the House language was "taken from H.R. 19586." 741 F.2d at 488 n.18. That statement is incorrect, since H.R. 19586, 91st Cong., 2d Sess. (1970), was not introduced until October 6, 1970, nearly a week after the House Judiciary Committee had reported the organized crime bill on September 30, *see* H.R. Rep. No. 1549, 91st Cong., 2d Sess. (1970). Instead, the Committee drafters almost certainly went to Senator Hruska's original bill, S. 1623, or to H.R. 9327, the companion House bill introduced the same day by Rep. Poff, who was the Senator's "opposite number" as principal minority spokesman for the bill in the House Judiciary Committee. *See* 115 Cong. Rec. 7069 (1969).

When Representative Steiger urged the House Judiciary Committee to add private remedies to the Senate-passed bill, he, too, concentrated on the goal of "guarding the American principle of free competition in the market place." House Hearings 520.[16] Even Representative Mikva, the most vocal opponent of the private remedy, warned *only* that "the trouble with this provision is that a dangerous tool is given *to a competitor* who wants to go after somebody *who is competing* too vigorously against him. . . ." 116 Cong. Rec. 35,342 (1970) (emphasis added).

The language chosen by Congress in § 1964(c) expresses this clear intention to create a new remedy only for one type of injury: the injury suffered by a legitimate competitor when organized crime infiltrates a business. The treble damage provision redresses the injury that occurs "by reason of" a "violation" of RICO's proscriptive provision, § 1962. A "violation" of § 1962 occurs, in turn, only when organized crime uses a "pattern of racketeering activity" to generate investment in, acquire, or conduct the affairs of an "enterprise" in a way that injures a legitimate competitor. As Senator Hruska and others recognized, the existing antitrust laws were inadequate to cope with that injury because, under normal antitrust principles, those laws protect only "competition, not competitors." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Civil RICO assured the victim of racketeer competition a personal right to recover, even if the racketeer's tactics did not affect market-wide competitive conditions.

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16. This concern for the honest businessman injured by "unfair competition" from a racketeer reflected a theme that had concerned Congress for many years. Two decades earlier, the Kefauver Committee had concluded that organized crime uses violence and "unscrupulous and discriminatory business practices" to "eliminate competitors and to compel customers to take articles sold by the mobsters"; this tactic gives the racketeer "a considerable advantage over a more timid competitor and is one of the means whereby the racketeer can push such a competitor to the wall." S. Rep. No. 307, 82d Cong., 1st Sess. 170 (1951).

Some lower courts have concluded that RICO also applies to any injury caused by any act of "racketeering activity" as defined in § 1961(1), not simply the competitive injury caused by the confluence of elements contained in § 1962. The treble damage provision, however, by its terms applies only to injury occurring "by reason of a violation of § 1962," as opposed to injury caused by "racketeering activity" as defined in § 1961(1).

A simple hypothetical illustrates the difference. When a racketeer-infiltrated laundry drives law-abiding competitors out of business by making and carrying out threats of physical abuse against customers of the competing laundries, it violates § 1962(c); the people who have infiltrated the laundry have conducted its affairs "through a pattern of racketeering activity." The legitimate, competing businesses have been injured "by reason of the violation" of § 1962(c) and may sue under RICO for treble damages. The direct victims of the threats and physical abuse, by contrast, have been injured by the acts of racketeering themselves. They have available to them all of the private tort remedies, including punitive damages, that pre-dated RICO — remedies that Congress never suggested were inadequate. Quite simply, Congress did not create the new RICO treble damage for their benefit, since they already had ample avenues to pursue damage claims.

Furthermore, the treble damage provision only applies to injury to "business or property." This provision excludes recovery for personal injuries, even though most of the illegal acts defined as "racketeering activity" directly threaten or inflict personal injury. The limitation to "business or property" injury would be inexplicable if Congress intended to create a remedy for injuries inflicted on the immediate victims of the predicate crimes rather than simply for the competing businessman who otherwise has no remedy at all.

B. The Separation Of RICO From The Antitrust Laws Was Not Intended To Alter The Type Of Competitive Injury Necessary For Recovery.

The decision to include the treble damage remedy in RICO rather than in the antitrust laws does not mean, as some have argued, that Congress meant to cover more than "competitive injury." Senator Hruska's bill (S. 1623) was, as he explained when introducing it, a "synthesis" of two bills he had introduced in the prior Congress, S. 2048, 90th Cong., 1st Sess. (1967) and S. 2049, 90th Cong., 1st Sess. (1967). 115 Cong. Rec. 6993 (1969). Those earlier bills had proposed anti-racketeering amendments to the Sherman Act. Senator Hruska had explained that, under those proposals, "the evil to be curbed is the unfair competitive advantage" available to organized crime in its incursions into legitimate business. 113 Cong. Rec. 17,999 (1967). The repeated references in the legislative history to "unfair competition" are significant, because the concept of unfair competition had evolved to protect not simply competition at large but also an individual entrepreneur's property and business opportunity. *See generally* Prosser & Keeton, *supra*, § 130 at 1005-08, 1013-15.

The Antitrust Section of the American Bar Association endorsed that objective, agreeing that existing antitrust law might not redress the type of injury for which Senator Hruska's proposal was designed, if the "extortion tactics" affected "only the victimized business" but did not also cause a "lessening of competition in an entire line of commerce." Senate Hearings 557. The Antitrust Section, however, cautioned against inserting anti-racketeering legislation in the antitrust laws. That approach, the Section noted, would cause an undesirable "commingling of criminal enforcement goals with the goals of regulating competition" and could lead courts to superimpose the entire antitrust "body of precedent." Senate Hearings 557, 558.

When Senator Hruska introduced the "synthesis" of his earlier bills as S. 1623, he explained that his objective

was still to create a remedy for the "honest businessman who has been damaged by unfair competition" from racketeer infiltration, but he agreed that the remedy belonged "in a separate statute rather than within the existing framework of the Sherman Act. . . . " 115 Cong. Rec. 6993 (1969). Congress eventually agreed. The original goal, however, remained unchanged: to create a new private remedy to redress injury caused by "unfair competition" from racketeer-infiltrated businesses.

Thus, the civil RICO remedy, in contrast to treble damage actions under the antitrust laws, was intended to protect competitors, not just competition, but it was not intended to do more. Congress, of course, could decide that it wants to create private causes of action for all victims of federal criminal statutes, including the predicates listed in RICO, but that assuredly is not what Congress intended to do in 1970 — and had not even been asked to do — when it added the private civil remedy as, in Senator McClellan's words, a "minor change" in the organized crime control bill. 116 Cong. Rec. 36,293 (1970).

CONCLUSION

The judgment affirming the dismissal of the civil RICO claims should be affirmed.

Respectfully submitted.

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APPENDICES

APPENDIX A
A Partial Roster Of RICO Defendants

A partial roster of defendants in private RICO suits includes the following established and respected entities that private claimants have charged with engaging in a "pattern of racketeering":

Investment bankers and brokers

Bache Halsey Stuart Shields, Inc.
Bear Sterns & Co.
Dean Witter Reynolds
E.F. Hutton & Co.
Lehman Brothers Kuhn Loeb, Inc.
Loeb Rhodes & Co., Inc.
Merrill Lynch, Pierce Fenner & Smith, Inc.
Morgan Stanley & Co., Inc.
Oppenheimer & Co.
Paine Webber Jackson & Curtis, Inc.
Shearson/American Express, Inc.
Thomson McKinnon Securities, Inc.

National C.P.A. Firms

Alexander Grant & Company
Arthur Andersen & Co.
Coopers & Lybrand
Ernst & Whinney
Laventhol & Horwath
Peat Marwick Mitchell & Co.
Price Waterhouse
Touche Ross & Co.

Law Firms

Lord, Bissel & Brook
Pierson, Ball & Dowd
Singer, Hutner, Levine & Seemans
Sullivan & Wooster

Banks

Citibank, N.A.
Continental Illinois National Bank & Trust Co.
Crocker National Bank
First American Bankshares, Inc.
First Interstate Bank of Oregon
First National Bank of Atlanta
First National Bank of Maryland
Marine National Bank (Wisconsin)
National Republic Bank of Chicago
Pacific Western Bank
Riggs National Bank of Washington, D.C.
Sierra Federal Savings & Loan Association
Southwest National Bank
State Bank of India
Union Bank

Insurance Companies

Allstate Insurance Co.
Lincoln Insurance Co.
Prudential Insurance Co. of America
State Farm Mutual Automobile Insurance Co.
Travelers Insurance Co.
Underwriters of Lloyd's, London
USLIFE Corp.

Manufacturing Companies

A.H. Robins Co., Inc.
Boeing Co.
Continental Group, Inc.
General Dynamics Corp.
General Motors Corp.
Miller Brewing Co.
Mitsui & Co. (U.S.A.), Inc.
Rockwell International Corp.
Rohm & Haas Co.

APPENDIX B
S. 1623, As Introduced By Senator Hruska

S. 1623

MARCH 20, 1969 [MR. HRUSKA]

A BILL

To amend title 18 of the United States Code to prohibit the investment of certain income in any business enterprise affecting interstate or foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Criminal Activities Profits Act".

DEFINITIONS

SEC. 1. As used in this Act—

(1) The term "criminal activity" means (A) any act involving murder, kidnaping, extortion, bankruptcy fraud, or the manufacture, importation, receiving, concealment, buying, or otherwise dealing in narcotic drugs or marihuana which is punishable under any statute of the United States; (B) any act which is punishable under any of the following provisions of title 18, United States Code: section 201

(relating to bribery), section 224 (relating to sports bribery), sections 891-894 (relating to extortionate credit transactions), sections 471, 472, and 473 (relating to counterfeiting), section 1084 (relating to the transmission of gambling information), section 1503 (relating to obstruction of justice), section 1952 (relating to racketeering), section 1954 (relating to welfare fund bribery), and chapter 117 (relating to white slave traffic); and (C) any conspiracy to commit any of the foregoing offenses.

(2) The term "interstate commerce" means commerce within the District of Columbia, the Commonwealth of Puerto Rico, or any possession of the United States, or between any place in a State and any place in another State, or between places in the same State through another State.

(3) The term "foreign commerce" means commerce between any State and any foreign country.

(4) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and American Samoa.

(5) The term "person" means any individual, and any partnership, corporation, association, or other legal entity.

(6) The term "income" means any income which is required by the Internal Revenue Code of 1954 to be reported as such for purposes of income taxation.

(7) The term "intentionally unreported income" means any income of any person which is subject to income taxation under the provisions of the Internal Revenue Code of 1954, but which with intent to evade the requirements of such code is not reported by such person as income within the time prescribed by such code.

PROHIBITION

SEC. 2. (a) Whoever, being a person who has received any income derived directly or indirectly from any criminal activity in which such person has participated as a principal within the meaning of section 2, title 18, United States Code applies any part of such income or the proceeds of any such income to the acquisition by or on behalf of such person of legal title to or any beneficial interest in any of the assets, liabilities, or capital of any business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce shall be guilty of a felony and shall be fined not more than $10,000, or imprisoned not more than ten years, or both.

(b) Whoever, being a director, officer, or agent of a corporation who has authorized, ordered, or performed any act which constitutes in whole or in part a violation of subsection (a) by such corporation, shall be guilty of a misdemeanor and shall be fined not more than $5,000, or imprisoned not more than one year, or both.

(c) Whoever (1) invests directly or indirectly any intentionally unreported income derived by such person from a proprietary interest in any business enterprise in any pecuniary interest in any other business enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce, or (2) uses any such income to establish or operate any such other business enterprise, shall be fined not more than $10,000, or imprisoned for not more than ten years, or both.

INJUNCTIONS

SEC. 3. (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 2.

(b) Under the direction of the Attorney General, it shall be the duty of United States attorneys, in their respective districts, to institute proceedings to prevent and restrain such violations. In any action by the United States under this section, the court shall proceed as soon as may be to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such temporary restraining order or prohibition as it shall deem proper.

(c) Any person (other than the United States) may institute action under this section, in any district court of the United States having jurisdiction over the parties, to prevent and restrain threatened loss or damage to such person from a violation of section 2. In any such action, relief shall be granted in conformity with the principles which govern the granting of injunctive relief from threatened loss or damage in other cases. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing of immediate danger of irreparable loss or damage, a preliminary injunction may be issued in any such action before a determination thereof upon its merits.

ACTIONS FOR DAMAGES

SEC. 4. (a) Any person who is injured in his business or property by reason of any violation of section 2 may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover threefold the damages sustained by him, and the cost of the action, including a reasonable attorney's fee.

(b) Whenever the United States is injured in its business or property by reason of any violation of section 2, it may institute a civil action in a district court of the United States, without regard to the amount in controversy, and shall recover the actual amount of the damages sustained, and the cost of the action.

(c) Except as otherwise provided by section 5, any action under this section shall be barred unless it is commenced within four years after the cause of action accrued.

EFFECT OF JUDGMENTS

SEC. 5. (a) A final judgment or decree entered in any civil or criminal proceeding instituted by the United States under this Act to the effect that a defendant has violated section 2 of this Act shall be prima facie evidence against such defendant, in any action brought by any other party against such defendant under this Act, as to all matters with respect to which such judgment or decree would be an estoppel as between the parties thereto. This subsection shall not apply to any consent judgment or decree entered before any testimony has been taken, or to any judgment or decree entered in an action under section 4(b).

(b) Whenever any civil or criminal action (other than an action under section 4(b)) is instituted by the United States to prevent, restrain, or punish any violation of section 2, the running of the period of limitations prescribed by section 4(c) with respect to any private right of action arising under this Act which is based in whole or in part on any matter complained of in such action by the United States shall be suspended during the pendency of such action by the United States and for one year thereafter. Whenever the running of such period of limitations is so suspended with respect to any right of action arising under section 4(a), action thereon shall be barred unless it is commenced within such period of suspension or within four years after the accrual of the cause of action.

VENUE AND PROCESS

SEC. 6. (a) Except as otherwise specifically provided by this Act, any civil or criminal action or proceeding under this Act against any person may be instituted in the district court of the United States for any district in which such person resides, is found, or has an agent, and any such action or proceeding against a corporation also may be instituted in such court for any district in which such corporation transacts business.

(b) In any action under section 3(b) of this Act in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

(c) In any civil or criminal action or proceeding instituted by the United States under this Act in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing a good cause.

(d) Except as otherwise specifically provided by this Act, all process in any action or proceeding under this Act against a corporation may be served in any judicial district in which such corporation is an inhabitant or is found.

EXPEDITION OF ACTIONS

SEC. 7. In any civil action instituted by the United States in any district court of the United States under this Act, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge (or in his absence to the presiding circuit judge) of the circuit in which such action is pending. Upon receipt of such copy, such judge shall designate immediately three judges of that circuit (of whom at least one shall be a circuit judge) to hear and determine such action. The judges so designated shall assign such action for hearing at the earliest practicable date, participate in the hearing and determination thereof, and cause such action to be expedited in every way.

EVIDENCE

SEC. 8. (a) In the taking of depositions for use in any civil action instituted by the United States under this Act and in the hearings before any examiner or special master appointed to take testimony therein, the proceedings shall be open to the public as freely as are trials in open court, and no order excluding the public from attendance at any such proceeding shall be made or enforced.

(b) No individual who gives testimony under oath, or produces documentary evidence under oath, in obedience to a subpena issued in any action or proceeding instituted by the United States under this Act may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he testifies, or produces documentary or other evidence, in such action, except that no such individual shall be exempt from

prosecution or punishment for perjury committed while so testifying.

APPEALS

SEC. 9. In every civil action instituted by the United States in any district court of the United States under this Act, an appeal from the final judgment of the district court will lie only to the Supreme Court.

APPENDIX C
Title IX Of S.30, As Reported Out Of The Senate Judiciary Committee

Calendar No. 612

91st CONGRESS
1st SESSION

S. 30

[Report No. 91-617]

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 10), 1969

Mr. McClellan (for himself, Mr. Ervin, and Mr. Hruska) introduced the following bill; which was read twice and referred to the Committee on the Judiciary.

DECEMBER 18 (legislative day, DECEMBER 16), 1969

Reported by Mr. McClellan, with an amendment.

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

Relating to the control of organized crime in the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * * That this Act may be cited as the "Organized Crime Control Act of 1969."*

STATEMENT OF FINDINGS AND PURPOSE

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily limited in scope and impact.

It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

* * *

TITLE IX—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

SEC. 901. (a) Title 18, United States Code, is amended by adding immediately after chapter 95 thereof the following new chapter:

"Chapter 96.—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

"Sec.
"1961. Definitions.
"1962. Prohibited racketeering activities.
"1963. Criminal penalties.
"1964. Civil remedies.
"1965. Venue and process.
"1966. Expedition of actions.
"1967. Evidence.
"1968. Civil investigative demand.

"§1961. Definitions.

"As used in this chapter—

"(1) 'racketeering activity' means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472,

and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment), section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the manufacture, importation, receiving, concealment, buying, selling or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

"(2) 'State' means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency or instrumentality thereof;

"(3) 'person' includes any individual or entity capable of holding a legal or beneficial interest in property;

"(4) 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

"(5) 'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter;

"(6) 'unlawful debt' means a debt (A) which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to gambling or usury, and (B) which was incurred in connection with the business of gambling or the business of lending money or a thing of value at a usurious rate, where the usurious rate is at least twice the permitted rate;

"(7) 'racketeering investigator' means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

"(8) 'racketeering investigation' means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

"(9) 'documentary material' includes any book, paper, document, record, recording, or other material; and

"(10) 'Attorney General' includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

"§ 1962. Prohibited activities

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

"(e) A violation of this section shall be deemed to continue so long as the person who committed the violation continues to receive any benefit from the violation.

"§ 1963. Criminal penalties

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

"(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or

prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

"(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

"§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

"(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

"(c) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

"§1965. Venue and process

"(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

"(b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States by the marshal thereof.

"(c) In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpena shall be issued for service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge of such court upon a showing of good cause.

"(d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

"§1966. Expedition of actions

"In any civil action instituted under this chapter by the United States in any district court of the United States, the Attorney General may file with the clerk of such court a certificate stating that in his opinion the case is of general public importance. A copy of that certificate shall be furnished immediately by such clerk to the chief judge or in his absence to the presiding district judge of the district in which such action is pending. Upon receipt of such copy, such judge shall designate immediately a judge of that district to hear and determine such action. The judge so designated shall assign such action for hearing as soon as practicable, participate in the hearings and determination thereof, and cause such action to be expedited in every way.

"§ 1967. Evidence

"In any proceeding ancillary to or in any civil action instituted by the United States under this chapter the proceedings shall be open to the public, and no order closing any such proceeding shall be made or enforced.

"§ 1968. Civil investigative demand

"(a) Whenever the Attorney General has reason to believe that any person or enterprise may be in possession, custody, or control of any documentary material relevant to a racketeering investigation, he may, prior to the institution of a civil or criminal proceeding thereon, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such material for examination.

"(b) Each such demand shall—

"(1) state the nature of the conduct constituting the alleged racketeering violation which is under investigation and the provision of law applicable thereto;

"(2) describe the class or classes of documentary material produced thereunder with such definiteness and certainty as to permit such material to be fairly identified;

"(3) state that the demand is returnable forthwith or prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

"(4) identify the custodian to whom such material shall be made available.

"(c) No such demand shall—

"(1) contain any requirement which would be held to be unreasonable if contained in a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation; or

"(2) require the production of any documentary evidence which would be privileged from disclosure if demanded by a subpoena duces tecum issued by a court of the United States in aid of a grand jury investigation of such alleged racketeering violation.

"(d) Service of any such demand or any petition filed under this section may be made upon a person by—

"(1) delivering a duly executed copy thereof to any partner, executive officer, managing agent, or general agent thereof, or to any agent thereof authorized by appointment or by law to receive service of process on behalf of such person, or upon any individual person;

"(2) delivering a duly executed copy thereof to the principal office or place of business of the person to be served; or

"(3) depositing such copy in the United States mail, by registered or certified mail duly addressed to such person at its principal office or place of business.

"(e) A verified return by the individual serving any such demand or petition setting forth the manner of such service shall be prima facie proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

"(f) (1) The Attorney General shall designate a racketeering investigator to serve as racketeer document custodian, and such additional racketeering investigators as he shall determine from time to time to be necessary to serve as deputies to such officer.

"(2) Any person upon whom any demand issued under this section has been duly served shall make such material available for inspection and copying or reproduction to the custodian designated therein at the principal place of business of such person, or at such other place as such custodian and such person thereafter may agree and prescribe in writing or as the court may direct, pursuant to this section on the return date specified in such demand, or on such later date as such custodian may prescribe in writing. Such person may upon written agreement between such person and the custodian substitute for copies of all or any part of such material originals thereof.

"(3) The custodian to whom any documentary material is so delivered shall take physical possession thereof, and shall be responsible for the use made thereof and for the return thereof pursuant to this chapter. The custodian may cause the preparation of such copies of such documentary material as may be required for official use under regulations which shall be promulgated by the Attorney General. While in the possession of the custodian, no material so produced shall be available for examination, without the consent of the person who produced such material, by any individual other than the Attorney General. Under such reasonable terms and conditions as the Attorney General shall prescribe, documentary material while in the possession of the custodian shall be available for

examination by the person who produced such material or any duly authorized representatives of such person.

"(4) Whenever any attorney has been designated to appear on behalf of the United States before any court or grand jury in any case or proceeding involving any alleged violation of this chapter, the custodian may deliver to such attorney such documentary material in the possession of the custodian as such attorney determines to be required for use in the presentation of such case or proceeding on behalf of the United States. Upon the conclusion of any such case or proceeding, such attorney shall return to the custodian any documentary material so withdrawn which has not passed into the control of such court or grand jury through the introduction thereof into the record of such case or proceeding.

"(5) Upon the completion of—

"(i) the racketeering investigation for which any documentary material was produced under this chapter, and

"(ii) any case or proceeding arising from such investigation,

the custodian shall return to the person who produced such material all such material other than copies thereof made by the Attorney General pursuant to this subsection which has not passed into the control of any court or grand jury through the introduction thereof into the record of such case or proceeding.

"(6) When any documentary material has been produced by any person under this section for use in any racketeering investigation, and no such case or proceeding arising therefrom has been instituted

within a reasonable time after completion of the examination and analysis of all evidence assembled in the course of such investigation, such person shall be entitled, upon written demand made upon the Attorney General, to the return of all documentary material other than copies thereof made pursuant to this subsection so produced by such person.

"(7) In the event of the death, disability, or separation from service of the custodian of any documentary material produced under any demand issued under this section or the official relief of such custodian from responsibility for the custody and control of such material, the Attorney General shall promptly—

"(i) designate another racketeering investigator to serve as custodian thereof, and

"(ii) transmit notice in writing to the person who produced such material as to the identity and address of the successor so designated.

Any successor so designated shall have with regard to such materials all duties and responsibilities imposed by this section upon his predecessor in office with regard thereto, except that he shall not be held responsible for any default or dereliction which occurred before his designation as custodian.

"(g) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section or whenever satisfactory copying or reproduction of any such material cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of this section, except that if such person transacts business in more than one such

district such petition shall be filed in the district in which such person maintains his principal place of business, or in such other district in which such person transacts business as may be agreed upon by the parties to such petition.

"(h) Within twenty days after the service of any such demand upon any person, or at any time before the return date specified in the demand, whichever period is shorter, such person may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon such custodian a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person.

"(i) At any time during which any custodian is in custody or control of any documentary material delivered by any person in compliance with any such demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section.

"(j) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section."

(b) The table of contents of part I, title 18, United States Code, is amended by adding immediately after

"95. Racketeering _____ 1951"

the following new item:

"96. Racketeer Influenced and Corrupt Organizations _____ 1961"

SEC. *902. (a) Paragraph (c), subsection (1), section 2516, title 18, United States Code, is amended by inserting at the end thereof between the parenthesis and the semicolon ", section 1963 (violations with respect to racketeer influenced and corrupt organizations)".*

(b) Subsection (3), section 2517, title 18, United States Code, is amended by striking "criminal proceedings in any court of the United States or of any State or in any Federal or State grand jury proceeding" and inserting in lieu thereof "proceeding held under the authority of the United States or of any State or political subdivision thereof".

SEC. *903. The third paragraph, section 1505, title 18, United States Code, is amended by inserting "or section 1968 of this title" after "Act" and before "willfully".*

SEC. *904. (a) The provisions of this title shall be liberally construed to effectuate its remedial purposes.*

(b) Nothing in this title shall supersede any provision of Federal, State, or other law imposing criminal penalities or affording civil remedies in addition to those provided for in this title.

(c) Nothing contained in this title shall impair the authority of any attorney representing the United States to—

(1) lay before any grand jury impaneled by any district court of the United States any evidence concerning any alleged racketering violation of law;

(2) invoke the power of any such court to compel the production of any evidence before any such grand jury; or

(3) institute any proceeding to enforce any order or process issued in execution of such power or to punish disobedience of any such order or process by any person.

* * *

MOTION FILED
MAR 29 1985

No. 84-648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., GIDON ARMON AND JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND STATE FARM INSURANCE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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MOTION OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND STATE FARM INSURANCE COMPANIES FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States: the Alliance of American Insurers, the American Council of Life Insurance, the American Insurance Association, the National Association of Independent Insurers, and State Farm Insurance Companies respectfully move, pursuant to Rule 36 of the Rules of this Court, for leave to file the attached brief as *amici curiae*. Although counsel for respondents has consented to the filing of this brief, counsel for petitioner has declined to consent.

INTEREST OF THE AMICI CURIAE

The National Association of Independent Insurers ("NAII") is the nation's largest property and casualty insurance trade association with more than 500 member companies. NAII members write nearly 40% of the property and casualty insurance in force in the United States.

The American Insurance Association ("AIA") is a national trade association of 174 property and casualty insurance companies. Its member companies account for approximately 25% of the property and casualty insurance written in the United States.

The Alliance of American Insurers (the "Alliance") is also a national property and casualty trade association. Its 175 member companies write approximately 12% of the nation's property and casualty insurance.

The American Council of Life Insurance ("ACLI") is the largest national trade association of the life insurance industry in the United States. Its 615 member companies account for approximately 95% of the life insurance in force in the United States.

The State Farm Insurance Companies ("State Farm") are a group of insurance companies composed of State Farm Mutual Automobile Insurance Company and its wholly-owned subsidiaries and affiliates. The State Farm Insurance Companies together constitute the nation's largest property and casualty insurer, accounting for approximately 10% of the property and casualty insurance in force in the United States.

The insurance company members of the Alliance, ACLI, AIA, and NAII, as well as State Farm, have been the victims of insurance fraud schemes perpetrated by organized criminal groups. Such schemes are among the types of activity that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1982), was designed to deter and State Farm and members of the Alliance, ACLI, AIA, and NAII have on occasion sought to recover treble damages for their injuries from these schemes under the civil provisions of RICO.

At the same time, however, these insurance companies have found themselves named as defendants in private civil RICO suits involving nothing more than garden-variety commercial disputes over the construction of a statute or contract. They have been labeled as "racketeers" for activities bearing no resemblance to the sorts of organized criminal activity that RICO was designed to prevent. These suits have significantly threatened the all-important business reputations of *amici*'s members and have been costly to defend.

Like the RICO cases brought against insurers, the present case and the other civil RICO case before the Court this term, *American National Bank and Trust Company of Chicago* v. *Haroco, Inc.*, involve attempts by private plaintiffs to apply RICO to alleged business frauds bearing none of the indicia of organized criminal activity. A decision by this Court broadly interpreting the scope of private civil RICO would expose insurance companies and other legitimate businesses to many more such suits. On the other hand, an overly narrow interpretation of the statute might bar insurers from recovering when they are victimized by the type of organized criminal behavior Congress enacted RICO to prevent.

Wherefore, it is respectfully requested that the Court grant leave to ACLI, AIA, NAII, the Alliance, and State Farm to file the attached brief as *Amici Curiae*.

Respectfully submitted,

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff must plead and prove racketeering enterprise injury in order to establish a claim for treble damages under Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act.

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BRIEF OF THE ALLIANCE OF AMERICAN INSURERS, THE AMERICAN COUNCIL OF LIFE INSURANCE, THE AMERICAN INSURANCE ASSOCIATION, THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AND STATE FARM INSURANCE COMPANIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Alliance of American Insurers, the American Council of Life Insurance, the American Insurance Association, the National Association of Independent Insurers, and State Farm Insurance Companies respectfully submit this brief as *amici curiae* to urge this Court to construe the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-

1968 (1982), in a manner that will preserve the availability of its civil treble-damage relief to persons who have been injured by activity characteristic of organized crime, but prevent its unwarranted extension to everyday commercial disputes not intended by Congress to be covered by the Act.

RICO was enacted to inhibit organized criminal activity and to protect innocent businesses from victimization by organized crime through infiltration, unfair criminal competition, and massive fraud. One of the businesses Congress intended to protect through RICO was the insurance industry, which had been injured repeatedly through concerted fraud schemes, especially arson frauds. *See, e.g.,* S. Rep. No. 617, 91st Cong., 1st Sess. 76, 77 (1969). As a result, insurance companies have brought a number of civil RICO actions in egregious cases to recover damages from such fraud schemes. *E.g., State Farm Fire and Casualty Co.* v. *Estate of Caton,* 540 F. Supp. 673 (N.D. Ind. 1982) (private RICO suit against convicted arson ring which had also engaged in extortion and murder).

In the last several years, however, civil RICO has been turned on its head. Many legitimate businesses, the intended beneficiaries of civil RICO, have found themselves named as defendants in federal RICO suits for treble damages based on incidents bearing no relation to the kinds of activity RICO was intended to prevent. In fact, these cases usually involve nothing more than garden-variety commercial disputes over the interpretation of statutes or contracts. The costs of defending against these RICO suits have been substantial and some businesses have felt forced to settle unmeritorious suits because of the risk of treble damages. In addition, these businesses have suffered significant injury to their reputation simply by being labeled as "racketeers" in complaints filed without restraints by private parties.

The insurance industry has been one of the major victims of this perversion of the purposes of RICO. Thus, insurance

companies have been sued under civil RICO in situations where the companies have merely conformed with standard industry practices.[1] In a series of Georgia cases, for example, approximately fifteen insurance companies have been sued under RICO for mail fraud. *E.g., May* v. *Travelers Insurance Co.,* Civil Action No. CV-484-411 (S.D. Ga. filed Dec. 12, 1984); *Bohannon* v. *Allstate Insurance Co.,* Civil Action No. CV-484-362 (S.D. Ga. filed Oct. 11, 1984); *Bateman* v. *State Farm Mutual Automobile Insurance Co.,* Civil Action No. CV-183-254 (S.D. Ga. removed to fed. ct. Nov. 23, 1983). In these cases, plaintiffs, often as purported representatives of a class, contend that under the Georgia no-fault statute insurers may not subrogate claims for which they have made full payment under automobile collision coverage and that these companies have injured their policyholders by limiting them to a single full recovery. Thus, through RICO, a disagreement regarding the proper interpretation of a state insurance law has been escalated into federal causes of action alleging fraud and racketeering and seeking treble damages and attorneys' fees.[2]

Barker v. *Underwriters at Lloyd's, London,* 564 F. Supp. 352 (E.D. Mich. 1983), provides another example of the inappropriate use of private RICO against an insurer. In that case, Lloyd's of London and the Lincoln Insurance Company,

[1] The following is a partial list of insurance companies which have been named as defendants in private RICO suits: Allstate Insurance Co., American Motorists Ins. Co., Atlanta Casualty Ins. Co., Cotton States Mutual Ins. Co., Georgia Farm Bureau Mutual, Lincoln Ins. Co., National Union Fire Ins. Co., Nationwide Ins. Co., Prudential Life Ins. Co. of America, Societe Commerciale de Reassurance, Southeastern Fidelity Ins. Co., Standard Guaranty Ins. Co., State Farm Fire and Casualty Ins. Co., State Farm Mutual Automobile Ins. Co., Travelers Ins. Co., Underwriters at Lloyd's, London, and United Services Automobile Association.

[2] Fearing their potential exposure in treble-damage civil RICO class actions, a number of insurance companies agreed to multimillion dollar settlements in two of these cases. Shortly thereafter, the Georgia Supreme Court upheld the insurance industry's position and rejected the plaintiff's interpretation of the no-fault statute. *Southeastern Fidelity Insurance Co.* v. *Nails,* Ga. Sup. Ct., Docket No. 41178 (decided March 14, 1985). Thus, by combining the threat of treble damages under RICO with potential classwide liability, plaintiffs extracted a substantial payment from these companies and coerced them to abandon a valid defense.

consistent with state-mandated claim settlement procedures, denied a claim under a fire insurance policy because they believed that the fire had been set by one of the plaintiffs. Plaintiffs sued, alleging, *inter alia,* a violation of RICO in that "defendants [through the use of the mails] have engaged in a scheme to defraud by fraudulently refusing to pay claims without valid reasons in order to force persons to compromise their claim for an amount less than they are entitled to under the insurance policies." *Id.* at 356.

Similarly, in *Activision, Inc.* v. *National Union Fire Insurance Co.,* Civil Action No. C-84-5352-MHP (N.D. Cal. filed Aug. 2, 1984), an insurance company was sued as a racketeer when it refused to make payments under, and sought to rescind, a directors and officers liability policy on the ground that misstatements had been made in the policy application. Plaintiffs alleged as a RICO violation that defendant was engaged in a scheme to issue such policies and collect premiums therefor with no intention of fulfilling its obligations under those policies. *Id.,* complaint at paras. 57-66.[3]

Thus, the insurance industry, an intended beneficiary of the statute, has become an unintended victim of civil RICO. As representatives of that industry, the American Council of Life Insurance, the American Insurance Association, the Alliance of American Insurers, the National Association of Independent Insurers, and State Farm Insurance Companies believe they offer a unique perspective on RICO that will aid the Court's consideration of this case. In this brief *amici curiae,* we suggest to this Court a principled interpretation of the statutory language of RICO, consistent with congressional intent, which distinguishes between proper and improper applications of

[3] It is important to note that in such cases RICO has been used in an effort to circumvent the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1982). That Act prohibits the application to the insurance industry of any federal law not specifically relating to the business of insurance if that law would impair, invalidate, or supersede a state law regulating the business of insurance. By invoking the federal cause of action created by RICO, plaintiffs in these actions have forced into a federal forum the adjudication of actions that Congress intended be left to the states.

private civil RICO and which does not in any way hinder criminal enforcement of the statute. This interpretation requires a plaintiff to prove injury of the type RICO was enacted to prevent, injury characteristic of organized crime, in order to invoke the treble-damage remedy of civil RICO.[4]

SUMMARY OF ARGUMENT

RICO was passed by Congress with one purpose in mind: to eradicate organized crime and prevent its infiltration of legitimate businesses. It was *not* intended to provide new, federal treble-damage remedies for everyday commercial injuries for which other remedies already exist. In the last several years, however, many hundreds of civil RICO suits seeking treble-damage relief have been filed in federal court in situations having nothing to do with organized criminal activity. Conversely, very few private RICO actions have been brought against members of organized crime.

This Court should interpret RICO in light of its clear legislative purpose to eliminate organized crime and prevent its infiltration of legitimate businesses and thereby stem the tide of inappropriate civil RICO litigation. Specifically, a private RICO plaintiff should be required to prove "racketeering enterprise injury" in order to recover treble damages. Such a requirement is explicit in the statutory language of Section 1964(c) and is consistent with the interpretation given by this Court in *Brunswick Corp.* v. *Pueblo Bowl-o-Mat, Inc.,* 429 U.S.

[4] This brief does not address the other issue raised by the Court of Appeals decision in *Sedima:* whether criminal convictions are a prerequisite to the recovery of civil damages under RICO. *Amici* note the substantial arguments being advanced by the American Institute of Certified Public Accountants as *amicus curiae* and by respondents in support of the proposition that prior criminal convictions are required. *Amici* urge that, regardless of the conclusion reached by the Court on the prior conviction requirement, the Court should require proof of racketeering enterprise injury as a prerequisite to recovery in a private RICO action.

477 (1977), to virtually identical language in Section 4 of the Clayton Act, 15 U.S.C. § 15 (1982), upon which Congress modeled Section 1964(c).

As it did in the antitrust context in *Brunswick*, this Court should take the opportunity presented by this case and by *American National Bank and Trust Company of Chicago* v. *Haroco, Inc.* to define the type of racketeering enterprise injury required by private RICO. Such a definition should have at least two components:

> (1) that the plaintiff's injury must be of the type characteristically suffered by a victim of organized crime's infiltration, takeover, or operation of a business; and
>
> (2) in a private RICO action based upon an alleged violation of Section 1962(c) of the statute, that the plaintiff must have suffered injuries from a "pattern of racketeering activity," *i.e.*, two or more separate but related episodes of criminal conduct.

Both of these injury limitations are consistent with the structure and statutory language of RICO. They serve to distinguish between proper and improper applications of civil RICO, by focusing treble-damage relief on prolonged, organized criminal behavior.

ARGUMENT

I. RICO WAS ENACTED TO COMBAT ORGANIZED CRIME; JUDICIAL INTERPRETATION OF RICO MUST TAKE THIS LEGISLATIVE PURPOSE INTO ACCOUNT

A. RICO Was Enacted To Combat Organized Crime and To Prevent Its Infiltration of Legitimate Business

RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 941 (1970). The stated purpose of that act was "to seek the eradication of organized crime in the United States . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*

The history of the Organized Crime Control Act reinforces this stated legislative purpose. The act evolved from the report of the President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967). That report concluded that "[i]nvestigation and prosecution of organized criminal groups in the 20th Century has seldom proceeded on a continuous, institutionalized basis." *Id.* at 196. President Nixon, therefore, early in 1969 urged Congress to take action because "the threat of organized crime cannot be ignored or tolerated any longer." H.R. Doc. No. 105, 91st Cong., lst Sess. at 2 (1969). Congress responded by enacting the Organized Crime Control Act which was a combination of eight separate bills dealing with various aspects of the problem of organized crime. S. Rep. No. 617 at 46-47.

Title IX of the act was RICO. RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 617 at 76. This purpose reflected Congress' growing awareness "of the depth of penetration of the forces of organized crime into the fabric of our society and our commercial life." *Id.* The Senate Report noted, for example, that, in one midwestern city, racketeers controlled or had large interests in 89 businesses with total assets of more than $800 million. *Id.* Once in control of a business, these crime syndicates would utilize techniques of violence and intimidation to gain an improper advantage in the marketplace. *Id.*

The principal tools chosen by Congress to effectuate RICO's purposes were criminal prosecutions, which may result in substantial jail sentences, stiff fines and even criminal forfeiture. 18 U.S.C. § 1963 (1982). In addition, Congress made available to the Federal Government civil remedies—such as injunctions and divestitures. 18 U.S.C. § 1964(a), (b) (1982). As a last-minute amendment, without any extended explanation or consideration, the House of Representatives added a provision for private treble-damage actions, 18 U.S.C. § 1964(c) (1982), explicitly modeled on Section 4 of the Clayton Act. *See Sedima, S.P.R.L.*, v. *Imrex Co.*, 741 F.2d 482, 488-92 (2d Cir. 1984) (discussing lack of

congressional consideration of private treble-damage provision). It was clearly anticipated that this private treble-damage provision would be used against organized criminals to effectuate the statute's purposes and to permit victims of organized crime to recover their economic losses.

There is no indication whatsoever in the legislative history that Congress intended either criminal or civil RICO to apply to anything other than the activities of organized crime.[5] As the United States Court of Appeals for the Ninth Circuit noted in *United States* v. *Marubeni America Corp.*, 611 F.2d 763 (9th Cir. 1980):

> We believe anyone who reads the legislative history must be struck by the singlemindedness with which Congress drafted RICO. Congress declared over and over again that its purpose was to rid legitimate organizations of the influence of organized crime. This purpose must be the linchpin of any construction of RICO.

611 F.2d at 769 n.11.

[5] Several Senators and Congressmen, as well as civil liberties groups, warned Congress that the terms of RICO could be applied to areas far removed from organized crime. *See* S. Rep. No. 617 at 215 (individual views of Sens. Hart and Kennedy); H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4083 (dissenting views of Reps. Conyers, Mikva, and Ryan); *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292, Before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary*, 91st Cong., lst Sess. 475 (1969) (Statement of the American Civil Liberties Union). It cannot, however, be inferred from the fact that several opponents of the bill foresaw this potential distortion of RICO that Congress intended such distortion.

B. Many Private Civil RICO Suits Have Been Filed in Situations Bearing No Connection to Organized Criminal Activity

Despite this clear statutory purpose, private treble-damage actions under RICO against organized crime figures have been exceedingly rare. Instead, in the last several years, many hundreds, if not thousands,[6] of civil RICO suits seeking treble damages have been brought in situations having nothing to do with organized criminal activity.[7] Private RICO actions have been filed in landlord-tenant disputes, *Salisbury* v. *Chapman*, 527 F. Supp. 577 (N.D. Ill. 1981), domestic relations disputes, *Erlbaum* v. *Erlbaum*, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 98,772 (E.D. Pa. 1982), and intra-church disputes, *Van Schaick* v. *Church of Scientology*, 535 F. Supp. 1125 (D. Mass. 1982); *Congregation Beth Yitzhok* v. *Briskman*, 566 F. Supp. 555 (E.D.N.Y. 1983). Most frequently, treble-damage civil RICO claims have been added to ordinary commercial lawsuits and securities litigation. *See, e.g., Haroco, Inc.* v. *American National Bank and Trust Co. of Chicago*, 747 F.2d 384, 386-87 (7th Cir. 1984), *cert. granted*, 105 S. Ct. 902 (1985); *see also* 16 Sec. Reg. & L. Rep. (BNA) 639 (April 13, 1984) (in one survey, 84 of 118 reported civil RICO cases

[6] In their brief *amici curiae* supporting an expansive construction of civil RICO, the 34 state Attorneys General estimate that there may be as many as 5,000 private RICO suits filed in federal court each year. *Sedima, S.P.R.L.* v. *Imrex Co.*, Brief for Amici Curiae in Support of Petitioner at 23 n.31.

[7] This contrasts sharply with the use by prosecutors of RICO's criminal sanctions. Criminal RICO prosecutions have been brought most frequently against organized crime families, *e.g., U.S. Indictment Says 9 Governed New York Mafia*, N.Y. Times, Feb. 27, 1985, at A1, col. 2 (RICO indictment of Mafia "Commission"); *19 Are Charged in City in Racketeering Inquiry*, N.Y. Times, Feb. 20, 1985, at B3, col. 5 (RICO indictment of Genovese crime family leader and members), criminal gangs, *e.g., 25 Members of a Notorious Chinatown Gang Are Accused of Racketeering*, N.Y. Times, Feb. 19, 1985, at B1, col. 1 (RICO indictment of youth gang accused of extortion, shakedowns, protection rackets, and murder), and corrupt public officials, *e.g., U.S. Indicts Gov. Edwards*, Washington Post, March 1, 1985, at A1, col. 4 (RICO indictment of Governor of Louisiana). "In the past two years, Federal prosecutors have used the RICO statute to obtain indictments of more than 2,000 people in the United States as part of a national crackdown on organized crime." N.Y. Times, March 3, 1985, § 4, at 6, col. 2.

involved either securities or commercial fraud); Note, *Rico and Securities Fraud: A Workable Limitation,* 83 Colum. L. Rev. 1513, 1513 (1983) (invocation of civil RICO in ordinary commercial and securities litigation "has become a routine event").

These cases highlight the ease with which a plaintiff's attorney can construct a RICO claim under an expansive reading of the statute. Both mail fraud, 18 U.S.C. § 1341 (1982), and wire fraud, 18 U.S.C. § 1343 (1982), are included among the list of predicate acts of racketeering activity in Section 1961(1). A person, claiming injury from a commercial misrepresentation, need only identify two telephone calls or mailings (or one of each) made by a business in connection with the alleged misrepresentation in order to assert a treble-damage claim for violation of Section 1962(c). He can allege that the person(s) making the calls or signing the letters conducted the affairs of an enterprise, the business, through a pattern of racketeering activity, the two communications. *See Haroco, Inc.* v. *American National Bank,* 747 F.2d at 387. Such a distorted construction of RICO's civil provisions was clearly not what Congress intended in enacting the statute.

C. RICO Must Be Interpreted in Light of Its Legislative Purpose

Judicial interpretation of RICO must take into account the clear congressional purpose to combat organized crime and prevent its infiltration of legitimate businesses. This is so for two reasons. First, the statute explicitly directs that it be construed with reference to its purpose. Second, the private damage provision of RICO is ambiguous, as evidenced by the divergent interpretations of the lower courts.

Congress explicitly ordered consideration of RICO's legislative purpose in Section 904(a) of the statute which provides: "The provisions of this title shall be liberally construed *to effectuate its remedial purposes.*" 84 Stat. at 947 (emphasis added). *See Sedima,* 741 F.2d at 488 ("We are, then, obliged to study the legislative history of RICO and particularly of section 1964(c) to inform our reading of that statute and, in

particular, of the scope of the private civil remedy created by the Congress"); *see also* Bridges, *Private Rico Litigation Based Upon "Fraud in the Sale of Securities,"* 18 Ga. L. Rev. 43, 57 n.92 (1983) ("The law itself calls for reference to legislative intent . . . since the liberal construction clause declares that the text should be construed to 'effectuate its remedial purposes' "). Section 904(a) does not simply require that RICO be broadly construed. Instead, that section calls for a construction which would best "effectuate its remedial purposes." 84 Stat. at 947. Thus, in the two prior Supreme Court decisions interpreting RICO, *United States* v. *Turkette,* 452 U.S. 576 (1981), and *Russello* v. *United States,* 464 U.S. 16 (1983), this Court construed RICO's statutory terms broadly in order to prevent organized criminals from escaping punishment (*Turkette*) and forfeiture (*Russello*) under the statute. The two private civil RICO cases now before the Court, by contrast, present a situation where a precise construction of the statute is necessary "to effectuate its remedial purposes."

In addition, reference to legislative purpose is appropriate to ascertain the meaning of statutory language where, as here, that language is ambiguous. *Griffiths* v. *Commissioner,* 308 U.S. 355, 358 (1939) ("Legislative words are not inert, and derive vitality from the obvious purposes at which they are aimed"); *Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers"). *See also United States* v. *American Trucking Associations,* 310 U.S. 534, 543 (1940) ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words") (quoting *Ozawa* v. *United States,* 260 U.S. 178, 194 (1922)).

The sharp disagreements among lower federal courts in their attempts to construe a variety of RICO provisions indicate that RICO "presents a classic case of a statute whose ambiguous language needs to be construed in light of Congress's purpose in enacting it." *Sedima,* 741 F.2d at 488; *see also*

Bridges, 18 Ga. L. Rev. at 57 n.92. Therefore, for this reason as well, RICO must be construed in light of the congressional purpose to eradicate organized crime and to remove its influence from legitimate business. Such a construction leads to the conclusion that a plaintiff must demonstrate "racketeering enterprise injury" in order to recover damages under civil RICO.

II. A PRIVATE CIVIL RICO PLAINTIFF MUST PROVE THAT HE HAS SUFFERED "RACKETEERING ENTERPRISE INJURY," THAT IS, INJURY OF THE TYPE RICO WAS INTENDED TO PREVENT

The main substantive provision of RICO is Section 1962. That section makes it unlawful, *inter alia,* (1) to invest income derived from a pattern of racketeering activity in any enterprise engaged in interstate commerce, 18 U.S.C. § 1962(a) (1982); (2) to acquire or maintain control of such an enterprise through a pattern of racketeering activity, 18 U.S.C. § 1962(b) (1982); (3) to conduct or participate in the conduct of such an enterprise's affairs through a pattern of racketeering activity, 18 U.S.C. § 1962(c) (1982); or (4) to conspire to engage in any of these activities, 18 U.S.C. § 1962(d) (1982). Taken together, the various subsections of Section 1962 form a coherent scheme for dealing with the problem of infiltration of legitimate businesses by organized crime. Subsection (a) prevents the infiltration of a business with profits derived from organized criminal activity; subsection (b) prevents the takeover of a business by means of organized criminal activity; and subsection (c) prohibits the illegitimate operation of a legitimate business that has been taken over by organized crime. [8]

[8] As this Court made clear in *Turkette,* Section 1962(c) also applies to the operations of an illegitimate enterprise. 452 U.S. at 580-93 ("enterprise" encompasses both legitimate and illegitimate enterprises). Congress clearly was aware of, and concerned about, such criminal enterprises and their effects on legitimate business. *Id.* at 591. Nevertheless, the primary focus of RICO was on the infiltration by organized crime of legitimate business and the various subsections of Section 1962 form a coherent plan for dealing with that problem. *Id.* and n.13.

In order for a plaintiff to recover through a private RICO action he must satisfy the requirements of Section 1964(c) of the Act. That section provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c) (1982).

The plain language of Section 1964(c) makes it clear that RICO does not provide a civil remedy to plaintiffs who have merely suffered injury from predicate acts of racketeering activity. Such acts of racketeering activity, defined in Section 1961(1) of RICO, were already criminal under existing provisions of state or federal law and persons injured by such acts already had available avenues of legal recourse in state or federal courts. Rather, in enacting RICO, Congress was concerned with a very particular type of criminal activity—that connected with organized crime's infiltration of legitimate businesses. Therefore, Congress only provided private civil relief under RICO for plaintiffs who had been injured "*by reason of a violation of section 1962.*" As Judge Oakes correctly concluded in the Court of Appeals decision below:

> RICO was intended not simply to provide additional remedies for already compensable injuries, but rather to provide added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

Sedima, 741 F.2d at 494 (footnote omitted).[9]

This interpretation of the "by reason of" language of Section 1964(c) is consistent with its legislative history. In enacting RICO, Congress sought to utilize the "weapons available under the antitrust laws to attack the 'property' of organized crime." *Organized Crime Control: Hearings on S.30, and Related Proposals, Relating to the Control of Organized Crime in the United States, Before Subcommittee No. 5 of the House Committee on the Judiciary,* 91st Cong., 2d Sess. 157 (1970) (statement of Attorney General Mitchell); *see also* S. Rep. No. 617 at 81; therefore, Congress deliberately adopted the language of Section 1964(c) from Section 4 of the Clayton Act. That section created a treble damage remedy for "[a]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws. . . ." 15 U.S.C. § 15 (1982) (emphasis added). In *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977), this Court ruled that Section 4 treble-damage relief was available only to a plaintiff who had suffered "injury of the type the antitrust laws were intended to prevent." [10] By direct analogy, for a plaintiff to recover treble damages on account of a violation of Section

[9] This distinction is quite clear in the context of a violation of subsection (a) or (b) of Section 1962. Frequently, in such situations, the person injured by a racketeer's acquisition of an interest in or takeover of an enterprise will not have suffered injury from the underlying pattern of racketeering activity. The predicate acts made it possible for the racketeer to gain control of the enterprise, but it is the person injured by that control, such as a minority partner in the enterprise or a competitor, that is the victim of a RICO injury. Note, *supra* p. 10, at 1532.

[10] The Court stated further:

> We therefore hold that for plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.

429 U.S. at 489 (emphasis in original).

1962 of RICO, he should be required to prove "racketeering enterprise injury," that is, injury of the type RICO was intended to prevent.[11]

III. RACKETEERING ENTERPRISE INJURY DEFINED

A majority of the lower federal courts considering the problem have concluded that a civil RICO plaintiff must prove "racketeering enterprise injury" in order to recover treble damages. *See, e.g., Alexander Grant & Co.* v. *Tiffany Industries,* 742 F.2d 408, 413 (8th Cir. 1984); *Bankers Trust Co.* v. *Rhoades,* 741 F.2d 511, 516 (2d Cir. 1984); *Margolis* v. *Republic National Bank,* 585 F. Supp. 595, 597 (S.D.N.Y. 1984); *In re Action Industries Tender Offer,* 572 F. Supp. 846, 852 (E.D. Va. 1983); *Harper* v. *New Japan Securities Int'l, Inc.,* 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982); *Landmark Savings & Loan* v. *Loeb Rhoades, Hornblower & Co.,* 527 F. Supp. 206, 208-09 (E.D. Mich. 1981). Courts which have rejected this injury requirement have done so in part because of difficulty in defining this term adequately. *See, e.g., Haroco, Inc.* v. *American National Bank and Trust Co.,* 747 F.2d 384, 389 (7th Cir. 1984), *cert. granted,* 105 S. Ct. 902 (1985); *In re Catunella and E.F. Hutton and Co. Sec. Litigation,* 583 F. Supp. 1388, 1436-37 (E.D. Pa. 1984).

[11] Courts which have rejected special RICO injury requirements have stressed that Congress expressly chose not to attach RICO to the antitrust laws. *See, e.g., Schacht* v. *Brown,* 711 F.2d 1343, 1357 (7th Cir.), *cert. denied,* 104 S. Ct. 509 (1983); *Ralston* v. *Capper,* 569 F. Supp. 1575, 1580 (E.D. Mich. 1983). They argued that this was done so as to avoid importing antitrust principles of standing into RICO. *Subcommittee No. 5 Hearings on S.30, supra* p. 14, at 149 (statement of the Antitrust Section of the American Bar Association; 115 Cong. Rec. 9567 (daily ed. April 28, 1969) (statement of Sen. McClellan); 115 Cong. Rec. 6993 (daily ed. March 3, 1969) (statement of Sen. Hruska). From these arguments, one may conclude that RICO should not be interpreted to require an antitrust-type, "competitive" injury. *See, e.g., Bunker Ramo Corp.* v. *United Business Forms, Inc.,* 713 F.2d 1272, 1288 (7th Cir. 1983); *Schacht* v. *Brown,* 711 F.2d at 1358; *Bennett* v. *Berg,* 685 F.2d 1053, 1059 (1982), *aff'd en banc,* 710 F.2d 1361 (8th Cir.), *cert. denied,* 104 S. Ct. 527 (1983). But it does not follow therefrom that Congress intended no limitation on private civil RICO actions. As the Court of Appeals below noted: "By borrowing language imposing a standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO." *Sedima,* 741 F.2d at 495.

As it did in the antitrust context in *Brunswick*, this Court should take the opportunity presented by this case and by *American National Bank* v. *Haroco, Inc.* to define the parameters of racketeering enterprise injury. Such a definition need not be so precise as to resolve every case which may conceivably be brought under the private civil provisions of RICO. Under the antitrust laws, from which the private civil provisions of RICO were adapted, Congress intended that the courts would develop a common law of the conduct prohibited and the types of antitrust injuries which can be compensated. *See* P. Areeda & D. Turner, *Antitrust Law* ¶ 302 (1978) (Sherman Act gave federal courts general authority to develop antitrust law through common law method). Analogously, the lower federal courts, with guidance from this Court, can evolve the standards for permitting private treble-damage civil RICO actions.

This Court must enunciate the broad principles which will guide the lower Federal courts. Any definition of racketeering enterprise injury must be consistent with both the statutory language and the legislative purpose of RICO. It should limit recovery to plaintiffs who have suffered "injury of the type [RICO was] intended to prevent." *Amici curiae* suggest that any such definition should have two components, both reflective of RICO's concern with ongoing, concerted criminal behavior. First, the plaintiff's injury must be of the type characteristically suffered by victims of organized crime and its infiltration, takeover, and operation of a business. Second, where a violation of Section 1962(c) is alleged, the plaintiff must be injured by the conduct of an enterprise through a pattern of racketeering activity; that is, his injury must stem from multiple episodes of criminal conduct linked by common objectives or means.

1. A Private RICO Plaintiff's Injury Must Be Characteristic of That Suffered by a Victim of Organized Crime

First, in order to show that he has suffered racketeering enterprise injury, a plaintiff should be required to prove that his injury was characteristic of that suffered by a victim of organized crime in its infiltration, takeover, or operation of an enterprise. This conclusion is implicit in the structure of RICO. RICO proscribes conduct that is committed often, but not always, by organized crime groups. The statute then calls for a discretionary determination whether, in a particular case, a plaintiff's injury which fits within the literal terms of the statute is characteristic of that suffered by victims of organized crime.

As noted, *supra* p. 12, the various subsections of Section 1962 proscribe different stages of a course of conduct characteristic of the manner in which organized crime infiltrates legitimate businesses. S. Rep. No. 617 at 123 (Letter from Deputy Attorney General Kleindienst) ("The prohibitions contained in section 1962 of the bill appear to be broad enough to cover most of the methods by which ownership, control, and operation of business concerns are achieved"). An element of each such course of conduct is the commission of a pattern of racketeering activity. Racketeering activity, as defined in the statute, is not limited to acts always or primarily committed by organized crime syndicates. Instead, Section 1961(1) identifies a set of offenses "characteristic of organized crime." 116 Cong. Rec. 18,940 (daily ed. June 9, 1970) (Statement of Sen. McClellan); *see also* S. Rep. No. 617 at 34. The statutory language sweeps broadly in order to ensure that all incidents of organized crime infiltration of legitimate businesses are within its scope.

RICO then demands an exercise of discretion. In the criminal context, this discretion is prosecutorial in nature. *See, e.g., United States* v. *Weisman*, 624 F.2d 1118, 1123 (2d Cir.), *cert. denied*, 449 U.S. 871 (1980) (warning against "danger of abuse where a prosecutor attempts to apply the statute to situations for which it was not primarily intended") (quoting *United States* v. *Huber*, 603 F.2d 387 (2d Cir. 1979), *cert. denied*, 444 U.S. 1085 (1980)). Prosecutors will not bring criminal RICO actions against all persons whose conduct fits within the literal terms of the statute, but will only prosecute cases in which the conduct involved is characteristic of organized crime. Indeed, the Department of Justice has established such a policy in published RICO Guidelines designed to

protect against the statute's potential abuse. Executive Office for U.S. Attorneys, United States Attorneys' Staff Manual, *RICO Guidelines* (1981).

In the context of private RICO civil suits, prosecutorial discretion is absent. The potential for abuse is consequently manifest; the sheer number of civil RICO claims asserted in ordinary commercial litigation demonstrates that the plaintiff's bar does not consider itself bound to employ RICO only in situations characteristic of organized crime. To prevent unwarranted applications of the treble-damage provision of RICO, Congress drafted Section 1964(c) in a manner that requires courts to exercise discretion and see that RICO is "not abused and applied to contexts outside those intended by Congress." *Moss* v. *Morgan Stanley Inc.*, 553 F. Supp. 1347, 1359 (S.D.N.Y.), *aff'd on other grounds*, 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1280 (1984). Congress did so by including the "by reason of" language in Section 1964(c). As with antitrust injury following *Brunswick*, a court must determine whether a plaintiff's injury is of the type RICO was intended to prevent, that is, whether it is characteristic of that suffered by victims of organized crime as a result of the infiltraton, takeover, or operation of an enterprise. If plaintiff's injury is not of that type, his RICO claim must be dismissed.

Congress gave courts ample guidance to make this determination. The legislative history of RICO is replete with examples of injuries characteristic of organized criminal conduct. These include: insurance companies defrauded by arson rings, S. Rep. No. 617 at 77, creditors' losses from bankruptcy scams, S. Rep. No. 617 at 35, 77; 116 Cong. Rec. 18,939 (daily ed. June 9, 1970) (statement of Sen. McClellan), businesses lost through extortion and usurious loan-sharking, S. Rep. No. 617 at 35, 77, injury to workers due to the takeover of labor unions followed by sweetheart contracts and the theft of union funds, S. Rep. No. 617 at 78, and consumers forced to pay higher prices and competitors driven out of business by the monopolization of an industry through the use of force, S. Rep. No. 617 at 77. Other examples can readily be identified.

More generally, Congress has identified a set of indicia which themselves are characteristic of organized criminal conduct and the infiltration by organized crime of legitimate businesses. Such indicia include: (1) the use of violence or the threat of violence, S. Rep. No. 617 at 41, 76, 77, 81; 116 Cong. Rec. 18,939-40 (daily ed. June 9, 1970) (statement of Sen. McClellan); 116 Cong. Rec. 35,227 (daily ed. Oct. 6, 1970) (statement of Rep. Steiger); (2) techniques of intimidation, S. Rep. No. 617 at 35, 76, 77; 116 Cong. Rec. 18,939 (daily ed. June 9, 1970) (statement of Sen. McClellan); (3) corruption, S. Rep. No. 617 at 41, 81; 116 Cong. Rec. 35,227 (daily ed. Oct. 6, 1970) (statement of Rep. Steiger); and (4) the involvement of multiple criminal actors, *see* Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L. Q. 1009, 1025 (1980) (RICO "directed at groups of individuals informally organized for a common purpose"); National Advisory Committee on Criminal Justice Standards and Goals, *Organized Crime: Report of the Task Force on Organized Crime*, p. 7 (1976) (organized crime involves "the hierarchical coordination of a number of persons in the planning and execution of illegal acts . . . .").

In order to show that he had suffered a racketeering enterprise injury, therefore, a civil RICO plaintiff should be required to prove that he has suffered injury characteristic of the victims of organized crime. This could be demonstrated either by showing that the plaintiff had been victimized by a pattern of organized criminal conduct in a manner described in RICO's legislative history or by showing the presence of several indicia of organized criminal behavior. *Cf.* Note, *supra* p. 10, at 1539 (the term "fraud in the sale of securities" in RICO should be limited to types of securities fraud mentioned in RICO's legislative history and closely analogous violations). Such a showing would necessarily be highly fact-specific; however, it would likely exclude most of the garden-variety commercial fraud civil RICO suits that have been flooding the federal courts.

It is important to stress that this requirement that a civil RICO plaintiff's injury be of the type suffered by victims of

organized crime is not the same as requiring that all RICO defendants be members of organized crime. This element of a racketeering enterprise injury focuses not on a defendant's status, but on the nature of the plaintiff's injury. Only "injury of the type [RICO was] intended to prevent" is injury "*by reason of* a violation of Section 1962" and compensable under Section 1964(c).

Two commentators, who advocate an expansive application of civil RICO, stated "there is nothing in RICO that says that, if legitimate businessmen act like racketeers, they should not be treated like racketeers." Blakey & Gettings, *supra* p. 19, at 1029 n.91. The insurance industry agrees. When legitimate businessmen act like racketeers, and cause injury characteristic of racketeers, they should be treated like racketeers. But before a civil RICO action can be brought against legitimate businessmen, they must have acted like racketeers.

2. To Demonstrate Racketeering Enterprise Injury Under Section 1962(c), the Plaintiff Must Have Suffered Injuries from Two or More Separate but Related Episodes of Racketeering Activity

The second suggested element of racketeering enterprise injury attacks another aspect of the problem of organized crime, focusing on its ongoing, repetitive nature. A private RICO plaintiff, alleging a violation of Section 1962(c) of the statute,[12] should be required to prove that he has suffered injuries from at least two separate but related episodes of criminal conduct.[13]

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[12] Section 1962(c) of RICO is the provision alleged to have been violated in both *Sedima* and *Haroco*, and in 97% of all RICO treble-damage actions. *Report of the Ad Hoc Civil Rico Task Force of the ABA Section of Corporation, Banking and Business Law 55 (1985).*

[13] In a civil RICO class action, each member of the plaintiff class must have been injured by two separate, but related episodes of criminal conduct committed by the defendant(s). Class members may not aggregate their injuries to satisfy the racketeering enterprise injury requirement. *Cf. Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973) (each class member must independently satisfy the jurisdictional-amount requirement).

Section 1964(c) provides treble-damage relief only to persons who have been injured "by reason of a violation of Section 1962." The violation proscribed by subsection (c) of Section 1962 is "the conduct of [the affairs of an enterprise engaged in interstate commerce] *through a pattern of racketeering activity*" (emphasis added). Therefore, in order to have sustained racketeering enterprise injury, a private RICO plaintiff must have been injured by the pattern of racketeering activity carried out on behalf of the enterprise.

To have been injured by the pattern, the plaintiff first must have been injured by multiple predicate acts of criminal conduct, because RICO explicitly provides that a pattern of racketeering activity "requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5) (1982). *Cf. Yancoski* v. *E. F. Hutton & Co., Inc.*, 581 F. Supp. 88, 96 (E.D. Pa. 1983) ("The requirement of injury by reason of a violation of section 1962 should therefore be read as simply requiring that the plaintiff was injured by at least two acts of racketeering activity—a pattern—charged to the defendant").

In addition, in order for a RICO plaintiff to have been injured by a pattern of racketeering activity, the predicate acts of racketeering that injured him must bear some relationship to each other, such as a common scheme, plan, or motive. *See, e.g., United States* v. *Brooklier,* 685 F.2d 1208, 1222 (9th Cir. 1982), *cert. denied,* 459 U.S. 1206 (1983) (acts must be connected by common scheme, plan, or motive); *United States* v. *Starnes,* 644 F.2d 673, 678 (7th Cir.), *cert. denied,* 454 U.S. 826 (1981) (acts must be logically connected); *United States* v. *Kaye,* 556 F.2d 855, 860-61 (7th Cir.), *cert. denied,* 434 U.S. 921 (1977) (acts must be interrelated); *United States* v. *Stofsky,* 409 F. Supp. 609, 614 (S.D.N.Y. 1973) (common scheme, plan, or motive required), *aff'd,* 527 F.2d 237 (2d Cir. 1975), *cert. denied,* 429 U.S. 819 (1976); *United States* v. *White,* 386 F. Supp. 882, 883-84 (E.D. Wis. 1974) (interrelationship between acts required). *But see United States* v. *Weisman,* 624 F.2d at 1121-23; *United States* v. *Elliott,* 571 F.2d 880, 899 n.23 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978).

Such a relationship is required by RICO's statutory language. Unlike all of the other definitions in Section 1961, Section 1961(5) does not define a pattern of racketeering activity. Instead, it establishes a minimum that is necessary, but may not be sufficient, to constitute a pattern of racketeering activity. A pattern of racketeering activity "*requires at least* two acts of racketeering activity." 18 U.S.C. § 1961(5) (1982) (emphasis added). As Senator McClellan, one of the Organized Crime Control Act's principal sponsors, noted: "The term 'pattern' itself requires the showing of a relationship .... [P]roof of two acts of racketeering activity, without more, does not establish a pattern ...." 116 Cong. Rec. 18,940 (daily ed. June 9, 1970). *See also, Subcommittee No. 5 Hearings on S.30, supra* p. 14, at 664-65 (testimony of Will Wilson, Assistant Attorney General, and Ronald Gainer, Deputy Chief of the Criminal Division, Department of Justice) ("acts of racketeering activity proved must be related" (Wilson); "[i]f they are not related they would not form a pattern" (Gainer)).[14]

Finally, to form a pattern of racketeering activity, the predicate acts which injured the plaintiff must have occurred in separate criminal episodes; Congress, in enacting RICO, was concerned with continuous, ongoing criminal activity. *See, e.g.,* S. Rep. No. 617, 91st Cong., 1st Sess. at 158 (1969) ("The infiltration of business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of continuity plus relationship which

[14] Additional evidence that Congress intended a "pattern of racketeering activity" to require a relationship between the predicate acts can be found in the use of the word "pattern" in a similar, simultaneously enacted provision of the Organized Crime Control Act of 1970. In 18 U.S.C. § 3575(e) (1982), concerning dangerous special offender sentencing, Congress provided that "criminal conduct forms a *pattern* if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events" (emphasis added). Construing the provisions of the Organized Crime Control Act *in pari materia, United States* v. *Becker,* 461 F.2d 230, 232 (2d Cir. 1972), *vacated on other grounds,* 417 U.S. 903 (1974), it is reasonable to conclude that Congress intended a "pattern of racketeering activity" to require that the predicate acts be similarly interrelated. *See United States* v. *Stofsky,* 409 F. Supp. at 614.

combines to produce a pattern"). Therefore, Congress enacted the pattern requirement in RICO to ensure that the statute would only apply to persons engaged in repeated criminal conduct. *See United States* v. *Field,* 432 F. Supp. 55, 59 (S.D.N.Y. 1977), *aff'd,* 578 F.2d 1371 (2d Cir.), *cert. dismissed,* 439 U.S. 801 (1978) ("The language of the Act, which makes a pattern of conduct the essence of the crime, 'clearly contemplates a prolonged course of conduct'") (quoting *Toussie* v. *United States,* 397 U.S. 112, 120 (1970)); *see also Teleprompter of Erie, Inc.* v. *City of Erie,* 537 F. Supp. 6, 12-13 (W.D. Pa. 1981) (Two act requirement "was included to ensure that RICO was utilized to prevent incidents constituting, or likely to constitute a continuous course of unlawful conduct. The stress is on a *series* of incidents and schemes which are *ongoing*") (emphasis in original). Apart from this legislative history, some courts have found a separate episode requirement implicit in the meaning of "pattern." *See United States* v. *Moeller,* 402 F. Supp. 49, 57 (D. Conn. 1975) ("[T]he common sense interpretation of the word 'pattern' implies acts occurring in different *criminal episodes,* episodes that are at least somewhat separated in time and place yet still sufficiently related by purpose to demonstrate a continuity of activity") (emphasis in original). *But see United States* v. *Parness,* 503 F.2d 430 (2d Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975).

Requiring a private RICO plaintiff to show that he had been injured by two or more related episodes of criminal conduct as part of a racketeering enterprise injury requirement would have two salutary effects on the application of civil RICO. First, it would limit civil RICO to patterns of criminal activity "that tend[] to characterize the perpetrator as a person who regularly uses crime as a means of achieving his desired ends." *Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law* 8 (1985) (supporting a separate but related episodes interpretation of pattern of racketeering activity). Second, unlike some other proposed definitions of racketeering enterprise injury, this requirement would allow a civil RICO plaintiff to recover treble damages for all of the injuries he suffered as a result of

underlying predicate acts of criminal conduct; his RICO recovery would not be limited to "indirect injury." *See, e.g., Haroco, Inc.* v. *American National Bank*, 747 F.2d at 392; *Schacht* v. *Brown*, 711 F.2d at 1356-58; Strafer, Massumi & Skolnick, *Civil RICO in the Public Interest: "Everybody's Darling,"* 19 Am. Crim. L. Rev. 655, 706 (1982) (all criticizing limitation of civil RICO to indirect injuries).

At the same time, this element of racketeering enterprise injury would not hinder criminal enforcement of RICO. The Department of Justice *RICO Guidelines* already prohibit a prosecutor from seeking a RICO indictment where all of the acts of racketeering arise from a single criminal episode or transaction, *RICO Guidelines, supra* p. 18, Guideline IV, No. 9-110.340, and federal prosecutors usually insist upon some relationship between the predicate acts. *See, e.g., United States* v. *Stofsky*, 409 F. Supp. at 613 (prosecutor suggested to the court that RICO requires predicate acts to be connected by common scheme, plan, or motive). Finally, unlike a private civil action, a RICO prosecution could still be brought where the defendants committed several related predicate offenses against different victims.

CONCLUSION

For the reasons stated herein, *amici curiae* respectfully urge this Court to hold that a plaintiff must plead and prove racketeering enterprise injury in order to state a claim and recover treble damages under RICO. Such an injury can be demonstrated by proof that the injury was characteristic of that suffered by victims of organized crime and, in a suit alleging a violation of Section 1962(c), that the plaintiff has suffered injuries from a pattern of two or more related episodes of racketeering activity. Such a holding, consistent with the statutory language, structure, and legislative intent of RICO, would allow true victims of organized criminal conduct to recover fully for their injuries. At the same time, this construction would limit the perverse application of RICO, never intended by Congress, to everyday commercial disputes.

In the case before the Court, the petitioner has allegedly suffered injury from repeated overcharges. The acts complained of bear none of the indicia of organized criminal conduct. They involve no violence, intimidation, or corruption, and could have been carried out by a single criminal actor. Instead, if the allegations are true, Sedima, S.P.R.L., is the victim of a straightforward case of business fraud. Petitioner is entitled to seek recovery of its losses in a state fraud action. Its civil RICO claim, however, should be dismissed and the judgment of the Court of Appeals of the Second Circuit should be affirmed.

Respectfully submitted,

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In The Supreme Court of the United States

October Term, 1984

SEDIMA, S.P.R.L.,

Petitioner,

vs.

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Congress intended to authorize civil suits for treble damages under the Racketeer Influenced and Corrupt Organizations statute in cases where the injuries sustained are unrelated to the underlying purpose of the statute.

2. Whether Congress intended to authorize civil suits for treble damages under the Racketeer Influenced and Corrupt Organizations statute in cases where the defendants have never been convicted of any of the predicate crimes listed in the statute.

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IN THE
SUPREME COURT OF THE UNITED STATES
No. 84-648

SEDIMA, S.P.R.L.,

Petitioner,

v.

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This case provides a vivid illustration of the extent to which the private bar has misapplied the civil damages provisions of the Racketeer Influenced and Corrupt Organizations statute ("RICO") to conventional commercial disputes. It grows out of a joint venture between two trading companies—petitioner Sedima, S.P.R.L., a Belgian importer and exporter of industrial goods and respondent Imrex, a New York corporation specializing in the export of aeronautical and aerospace material. In 1978, the parties entered into a complex agreement for the fulfillment of certain procurement contracts let by Atelier de Constructions Electriques de Charleroi (A.C.E.C.), a subcontractor for the North Atlantic Treaty Organization, which was then in the process of upgrading NATO's surface-to-air missiles in Europe.

Under the terms of the joint venture, A.C.E.C.

would deliver its requirements and technical specifications to Sedima, which would then forward them to Imrex. Imrex would research the United States market, send quotes to Sedima and, upon approval, send the material purchased in the United States to Sedima for eventual delivery to A.C.E.C. Sedima negotiated the prices between the joint venture and A.C.E.C. The difference between that price and the cost of the item in the American market represented the gross profit of the joint venture to be divided between Imrex and Sedima, after accounting for a number of administrative and financial expenses. At the inception of the joint venture, the parties had agreed to exchange accountings of their transactions periodically.

Sedima filed this lawsuit against Imrex in 1982, claiming that Imrex had defrauded it by preparing false purchase orders and credit memoranda overstating the cost of the items shipped to Sedima for delivery to A.C.E.C. The effect of such an overstatement, it is alleged, was that Imrex was able to keep a greater proportion of the real profit on a transaction than was provided for in the joint venture agreement. This suit was filed before either side rendered a final accounting of its costs and expenses.

In its complaint, petitioner pleaded a number of claims based on the common law of contract and fraud. It then amended its complaint and sought treble damages and attorneys fees under the RICO statute, 18 U.S.C. 1964(c), charging that Imrex and its management had engaged in a "pattern of racketeering activity" by violating the federal mail fraud[1] and wire fraud[2] statutes. In pleading this RICO claim, the

[1]18 U.S.C. 1341.

[2]18 U.S.C. 1343.

complaint made no allegation of an injury caused by the pattern of racketeering activity that differed in any way from the injury attributed to the underlying "predicate acts" of fraud.[3] Nor did petitioner allege that respondents had been convicted of any of the predicate offenses enumerated in the RICO statute.[4]

The District Court dismissed the RICO counts for failure to allege the particular kind of injury required to make out a RICO claim for damages. Without deciding which of two competing analyses of "RICO injury" was correct—a racketeering-type injury or competitive injury resulting from racketeering activity—the court relied on the fact that there was "no allegation . . . of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud." Pet. App. 63a. The court reasoned that to "permit the RICO claim to stand under such circumstances would represent an unwarranted extension of the statute's coverage that is not supported by the case law." *Ibid.*

[3]The damages sought for the RICO claim were identical in amount with those sought in the previous counts of the complaint.

[4]After this case was filed, and with Sedima as complainant, the District Attorney of Nassau County, New York charged all respondents with grand larceny and falsifying certain "purchase order documents" used internally by the joint venturers. Since Gidon and Jacob Armon had already admitted technical violations of New York's broad business record statute (NY Penal Law §175.10) in depositions taken in this case, they agreed to allow the corporate defendant to plead guilty to two counts of that statute in January, 1985. A fine was imposed, and all other charges against all the respondents were dismissed. Violations of the business records statute could not be construed as any possible predicate act listed in Section 1961.

The Court of Appeals for the Second Circuit affirmed. It first held that a civil RICO damages claim must be premised on a showing of "racketeering injury"—defined as the special kind of injury typically caused by organized crime in its infiltration of legitimate businesses or operation of illegal enterprises. Pet. App. 27a-28a. In its view, no other rule would be consistent with the purposes for which RICO was passed. The court then held that a civil RICO claim also must be based on a pre-existing criminal conviction of the defendant with respect to the underlying predicate offenses. Pet. App. 28a-44a. The basis for this holding was the structure of the statute, which premises civil liability on a "pattern" of *criminal* predicate acts. The court concluded that Congress could not have intended to allow private citizens to bring actions in which they would seek to label someone a "racketeer" by proving such criminal conduct in a civil case. In so ruling, the Second Circuit pointed to the difficult burden-of-proof issues that would be raised by such a procedure, Pet. App. 39a-40a, and to the "liberal construction" provision of the statute,[5] which it viewed as indicative of a congressional assumption that civil RICO would be applied only against persons previously convicted of predicate criminal offenses, Pet. App. 40a-41a.

Judge Cardamone dissented. He argued that the prior conviction requirement was not supported by the language of the RICO statute. He then argued that Congress did not intend any rule requiring a special form of "RICO injury." Because several panels of the Second Circuit were considering simultaneously the issues raised here, the court took a vote on whether to consider the issues en banc. It

[5]Pub. L. No. 91-452, 904(a), 84 Stat. 947 (1970).

decided instead to issue the opinions in the order in which they were completed, thus making the opinion in this case the controlling law in the circuit. *See Furman v. Cirrito*, 741 F.2d 524, 525 (2d Cir. 1984).

SUMMARY OF ARGUMENT

1. The basic purpose of RICO was to attack organized crime. Congress sought to do this by creating a flexible prosecutorial tool aimed at the infiltration of legitimate businesses as well as the operation of wholly illegal organized crime enterprises. The civil damages provision added to RICO near the end of the legislative process did nothing to increase that intended scope. It is clear, therefore, that the widespread invocation of civil RICO in routine commercial disputes like this case is a development that Congress never sought to authorize. In view of the effect of this trend—the massive federalization and revision of numerous areas of commercial law—there is a clear need for a more careful interpretation of the statute that will effectuate the intent of Congress.

2. At minimum, Congress must have intended the courts to impose some substantive limits on the cases in which civil RICO can be used. Such a "RICO injury" requirement was foreshawdowed when Congress modelled the treble damages provision directly on the Clayton Act, with its analogous "antitrust injury" rule. The requirement can be defined on the basis of the concerns about organized crime reflected directly in the RICO statute. A RICO plaintiff must show an injury beyond the mere recitation of predicate acts, caused by an enterprise that, in its organization and its pattern of activities, conducts itself in a manner characteristic of organized crime.

3. In addition, the structure of RICO reveals a congressional intention that civil suits be brought only against those who have at least been convicted of underlying predicate offenses. The alternative approach of allowing civil plaintiffs to prove that their opponents are criminal racketeers simply is not a plausible interpretation of what Congress must have had in mind. It would expose defendants to the consequences of being labelled proven criminals without any of the traditional protections accorded to criminal defendants.

The civil RICO action is in fact a remedy to recoup economic loss from proven violators and to inflict the punitive aspects of treble damages and counsel fees against the intended targets of the statute.

ARGUMENT

I. THE CLEAR PURPOSE OF THE RICO STATUTE, AND ITS TREBLE DAMAGES PROVISION, WAS TO ATTACK ORGANIZED CRIME AND PROTECT THE VICTIMS OF ORGANIZED CRIME.

As the Second Circuit recognized, the federal courts have recently experienced an "explosion of civil RICO litigation." Pet. App. 7a. This relatively new statute has become a tool used frequently by litigants in a whole variety of commercial cases, including "typical business fraud cases, . . . 'garden variety' securities fraud cases, and . . . bank fraud cases." Pet. App. 10a (citing cases). The defendants in these actions, far from being limited to "racketeers," have included some of the largest and most successful cor-

porations in America. Pet. App. 9a (citing cases).

This general trend, exemplified by the facts of the instant case, plainly represents a gross distortion of the intent of Congress in passing RICO. Far from being a new tool in the on-going fight against the criminal syndicates, civil RICO has become a virtually limitless fount of federal jurisdiction over commercial disputes. As a result, it has given plaintiffs the unexpected windfall of a potential treble damages recovery, as well as the useful tactical device of being able to label their opponents "racketeers." In corresponding fashion, it has swept away carefully carved state[6] and federal[7] legal limitations on the rights and remedies of these same plaintiffs.

The divergence between these developments and the intent of Congress is not difficult to perceive. Congress went to the trouble of setting out its purposes in

[6] "For example, in the instant case, absent RICO the plaintiffs' opportunities for seeking punitive damages would be quite limited. Under New York law, there could be no punitive damages awarded under the contract-based counts in the complaint, *Garrity v. Lyle Stuart, Inc.*, 40 N.Y.2d 354 (1976), and such damages could be awarded under the fraud counts only based on a showing of "criminal indifference to civil obligations." *Walker v. Sheldon*, 10 N.Y.2d 401 (1961). The effect of allowing a RICO claim here is to provide an award far greater than the actual damages available under state law—treble damages plus attorneys' fees.

[7] For example, in the securities field, this Court has applied a requirement of a purchase or sale of securities as a prerequisite to federal fraud claims. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Under RICO, such a requirement could be vitiated and a plaintiff could prevail by suing for mail or wire fraud where, for example, he is a shareholder who chose not to sell during a period of declining prices based on the repeated advice of a broker. Similarly, the generous damage provisions of RICO would effectively repeal the more limited civil damages provisions applied under section 10 of the Securities Exchange Act of 1934.

great detail in the statute that contained RICO. It then designed RICO in ways that, while flexible, plainly reflect that original intent. Finally, the particular circumstances under which the civil damages provision was included in the statute make it absolutely clear that the civil remedy was never intended to broaden the substantive scope of RICO. For these reasons, we believe that the language of the statute must be interpreted in a manner that limits civil RICO to its intended field of operation.

The RICO statute was first enacted as Title IX of the Organized Crime Control Act of 1970. In passing that act, Congress made it clear that it had one, and only one, purpose—combatting "organized crime." Indeed, the very first section of the act contained a lengthy recitation of the depredations inflicted on our society by organized crime, including "drain[ing] billions of dollars from America's economy," operating gambling, fencing, loan sharking and narcotics syndicates and "other forms of social exploitation," infiltrating and corrupting businesses and unions, destabilizing the economy, harming investors, burdening competition and interstate commerce, threatening domestic security, and otherwise "undermin[ing] the general welfare of the Nation and its citizens." Pub. L. No. 91-452, 84 Stat. 922-23 (1970). In light of these recognized problems, Congress set out to "seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." Id. at 923. *See also Russello v. United States*, 104 S. Ct. 296, 302 (1983); *United States v. Turkette*, 452 U.S. 576, 588-89 (1981).

One of the measures adopted to attack the increasing "penetration of the forces of organized crime into the fabric of our society and our commercial life"[8] was Title IX—RICO. The "major purpose of Title IX [was] to address the infiltration of legitimate business by organized crime." *United States v. Turkette, supra*, 452 U.S. at 591. This concern was raised "again and again during the debates and in the hearings before the House and Senate." *Ibid.*[9] As Senator Hruska put it, RICO was "designed to remove the influence of organized crime from legitimate business by attacking its property interests and by removing its members from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." 116 Cong. Rec. 602 (1970). At the same time, however, as this Court recognized in *United States v. Turkette, supra*, Congress had a subsidiary but related purpose—attacking "enterprises" that are wholly criminal in nature. After all, such activities as loan sharking and narcotics dealing, by providing to organized crime "its primary sources of revenue and power," can themselves be a "springboard into the

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[8] S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969).

[9] *See, e.g.*, S. Rep. No. 617, 91st Cong., 1st Sess. 76 (1969) ("Senate Report") (RICO "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce); *Organized Crime Control: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 157 (1970) ("House Hearings") (Statement of Attorney General Mitchell) (Title IX is intended to "attack the 'property' of organized crime, and to protect legitimate businesses against the syndicates' infiltration"); 116 Cong. Rec. 591 (1970) (remarks of Sen. McClellan) ("Title IX is aimed at removing organized crime from our legitimate organizations"); *id.* at 35200 (remarks of Congressman St. Germain) ("Title IX . . . is aimed at keeping organized crime out of legitimate businesses through the use of both criminal and civil penalties.")

sphere of legitimate enterprise." 452 U.S. at 591.

These purposes are directly reflected in the central provision of RICO, 18 U.S.C. 1962, where Congress described the three kinds of activities that it sought to prohibit. First, in section 1962(a), Congress made it unlawful for anyone to use money derived from a "pattern of racketeering activity" to buy an interest in a commercial enterprise.[10] Then, in section 1962(b), it made it equally unlawful to acquire such an interest through some other means—coercion, fraud or the like—that would constitute a "pattern of racketeering activity."[11] Finally, in a somewhat more general provision, section 1962(c), Congress made it illegal to "conduct . . . the affairs" of any enterprise (legitimate or wholly illegal) through a pattern of racketeering activity.[12] These substantive provisions

[10]Section 1962(a) provides: "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . ."

[11]Section 1962(b) provides: "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

[12]Section 1962(c) provides: "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

were then tied to sections creating criminal[13] and civil[14] remedies.

The key term in each of the operative provisions of section 1962—the term that would be the linchpin for identifying and attacking organized crime—was a "pattern of racketeering activity." In that regard, Congress provided an extremely broad definition. It defined "racketeering activity" by reference to a long list of state and federal crimes ranging from "murder, kidnapping, gambling, arson, robbery, bribery, extortion [and] dealing in . . . drugs" to counterfeiting, theft, embezzlement, mail fraud, wire fraud, obstruction of justice, and securities fraud. 18 U.S.C. 1961(1). It then defined a "pattern of racketeering activity" as "at least two acts of racketeering activity" within ten years of each other. *Id.* 1961(5).

Obviously, these definitions do not strictly limit the application of RICO to cases that even resemble the concept of "organized crime" as it is generally understood. Whenever there is an identifiable "enterprise" (a legitimate one that has been infiltrated or simply an illegal "gang") and the potential defendants' conduct can be twice squeezed within the definition of one or more of the numerous crimes listed as possible "predicate acts," it can be argued that the

[13]18 U.S.C. 1963(a).

[14]In addition to the treble damages provision in section 1964(c), the statute provides for injunctions against violations issued at the behest of the government. 1964(a), (b), and for forfeiture, after a criminal conviction, of "any interest . . . acquired or maintained in violation" of the act, as well as of "any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted or participated in the conduct of, in violation" of the act, (1963(a)).

technical requirements have been fulfilled. Indeed, the plausibility of such an argument is what has led to the "explosion" of RICO claims that we have described.

The use of wire fraud and mail fraud statutes as the most commonly alleged predicate acts is due in large part to the very broad interpretation of those statutes in their basic applications. One court has characterized the stretch of such interpretations as "limitless." *U.S. v. VonBarta*, 635 F.2d 999, 1001, cert. den., 450 U.S. 998 (1981). Some courts have observed that the net effect of broad Civil RICO, based principally on mail and wire fraud claims, would be to grant a private right of action for those who were allegedly victimized by violations of these criminal statutes. See *Gramarcy v. Gramarcy Realty*, 591 F.Supp. 1408 (SDNY 1984). But the Courts have repeatedly held that there is *no* such private right of action. *Ryan v. Ohio Edison*, 611 F.2d 1170, 1177-79 (6th Cir. 1979). See also *Austin v. Merrill Lynch*, 570 F.Supp. 667 (W.D. Mich. 1983). (Indeed, this position follows the established rule that there should be no assumption of a private right of action under any federal statute where none is specified. *Sante Fe v. Green*, 430 U.S. 462 (1977).

It is clear, however, that the possible breadth of the literal terms of the statute is not, in this instance, an accurate indication of the intent of Congress. Put differently, nothing about the structure of RICO reflects a congressional purpose broader than attacking organized crime. On the contrary, breadth and flexibility were deliberately incorporated into the statute by Congress solely for the specific purpose of making it a potentially effective prosecutorial weapon against organized crime. Recognizing that it could not

simply legislate against "organized crime" *per se*,[15] Congress resolved to pass a much broader statute and rely on the discretion of federal prosecutors to apply it appropriately. For example, in the 1969 hearings on the Senate bill that was a precursor of the 1970 Organized Crime Control Act, Senator McClellan asked witnesses whether there was any way to "limit [the law's] application to organized crime."[16] He was told that there was no alternative to relying on prosecutorial discretion.[17] Later, he explained that it had proved "impossible to draw an effective statute which reaches most of the commercial activities of organized crime, yet does not include offenses commonly committed by persons outside organized crime as well."[18] He made it clear, however, that Congress did not expect the law to be *applied* to any significant extent to persons outside organized crime.[19] In sum, Congress knew that the literal terms of the statute were broader

[15] *See* 116 Cong. Rec. 35343 (1970) (remarks of Rep. Celler); *id.* at 35344 (remarks of Rep. Poff). Clearly the law does not identify the *status* of the defendant, specifically to avoid constitutional proscriptions of which the drafters were aware. See, for example, *Robinson v. California*, 370 U.S. 670 (1962), *Scales v. U.S.*, 367 U.S 203 (1961).

[16] *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 347 (1969) (question addressed to Henry Ruth, Deputy Staff Dir. of the Katzenbach Comm'n on Law Enforcement and Administration of Justice).

[17] *Id.* at 347, 424.

[18] 116 Cong. Rec. 18940 (1970).

[19] 116 Cong. Rec. 18940 (1970). *See also* 116 Cong. Rec. 35200 (1970) (remarks of Rep. St. Germain) ("Law enforcement officials know who the racket leaders are. . . .")

The Department implemented this congressional directive by promulgating restrictive Guidelines to govern federal RICO prosecutions. *United States Attorney's Manual* §9-110.200 to.413. These guidelines require selective use of RICO and prior approval of any such prosecution by the Organized Crime and Racketeering Section of the Criminal Division.

than its intended scope, but, because it had no alternative, it relied on the good faith of those implementing the law to keep it within the limits that Congress itself thought appropriate.

For present purposes, the key is the fact that all of these decisions about the scope of RICO were made well before there was any provision in the act for private enforcement—*i.e.*, at a time when the attention of Congress was focused exclusively on the need to give new power to the federal prosecutors, who were to use that power selectively and appropriately. RICO was passed first in the Senate, in the form of a bill (S. 30), sponsored by Senator McClenllan, that did not include any provision for civil damages against violators. The bill then went to the House Judiciary Committee, which made a number of amendments aimed primarily at limiting the scope of RICO in order to reduce its vulnerability to constitutional attack.[20] In addition, the House added a civil damages provision later codified as 18 U.S.C. 1964(c). This change was made at the behest of Representative Sam Steiger and the American Bar Association, both of whom recognized that the civil action was to be patterned after the private remedy found in the Clayton Act.[21]

There is no indication that the House Judiciary Committee or anyone else viewed this change as altering the substantive scope of the statute. In proposing it, Representative Steiger simply argued that "those who have been wronged *by organized crime* should . . .

[20]*See* H. Rep. No. 91-1549, 91st Cong., 2d Sess. 32 (1970) ("House Report") (1970) ("The Committee's principal aim has been to eliminate provisions vulnerable to constitutional objections and to revise sections deemed to be unworkable so that the legislation will withstand future court challenge."

[21]House Hearings, *supra*, at 520, 548.

be given access to a legal remedy."[22] And there is no reason to believe that others viewed the matter differently. The House Report barely mentioned the amendment.[23] And the debates in the full House hardly discussed damages at all. Finally, when the bill went back to the Senate, its sponsor, Senator McClellan, labelled the House amendments "minor changes" and the Senate agreed to them without further delay.[24]

In sum, nothing about the legislative history of RICO in general, or the civil damages provision in particular, suggests any intention to broaden the scope of the act beyond the original goal of attacking organized crime. The means selected for achievement of that goal was a potentially broad statute combined with clear statements of a congressional desire to limit the application of the statute to its intended targets. Responsible prosecutors were to be the principal means for maintaining adherence to this limiting intent.

The notion of allowing civil damage suits by victims was never more than an adjunct of the primary goal, aimed at the same limited category of criminal syndicates. Above all, there is no indication whatever that in passing this new provision of the federal criminal code Congress intended to create a new, extraordinarily broad civil remedy in federal court for every person aggrieved by a series of acts that could

[22]House Hearings, *supra* at 520 (emphasis added).

[23]*See* House Report, *supra*, at 35 ("The title, as amended, also authorizes civil treble damage suits on the part of private parties who are injured.")

[24]116 Cong. Rec. 36293-96.

be fit within the scope of one of the several dozen possible "predicate acts" listed in section 1961. Indeed, there is every reason to conclude that Congress would have been astonished by the trend toward routine use of the treble damages provision in cases, like the present one, having none of the common-sense indicia of organized-crime involvement. It is with this background in mind that we proceed to analyze the specific issues of statutory interpretation raised in this case.

II. CONGRESS INTENDED TO AUTHORIZE DAMAGE SUITS ONLY IN CIRCUMSTANCES WHERE, IN VIEW OF THE PARTICULAR KIND OF INJURY SUFFERED, IT IS CLEAR THAT CIVIL ENFORCEMENT WOULD BE CONSONANT WITH THE OVERRIDING GOAL OF FIGHTING "ORGANIZED CRIME."

The first issue addressed by the court below was whether a private plaintiff seeking to invoke RICO must allege some special form of "RICO injury." In our view, such a concept amounts to a shorthand way of describing the substantive limitations that Congress intended to govern the applications of the statute. What the Second Circuit held, quite simply, was that a plaintiff must be able to show the kinds of injury that typically flow from the "infiltration of legitimate enterprises" or operation of "illegitimate enterprises" by organized criminal syndicates. Pet. App. 27a. Such an interpretation of RICO is consistent with the statutory language and is essential if the statute is to be applied in the civil context in a way that parallels its main intended role as a new tool in the battle against organized crime.

A. *The statutory Basis of an Injury Requirement*

As we have noted, Congress relied primarily on prosecutors themselves to exercise their discretion and limit the application of RICO to cases involving organized crime. That reliance generally has not proved to be misplaced. The issue presented here is whether Congress also intended to rely solely on the "discretion" of private plaintiffs concerning when it was appropriate to apply the severe sanction of treble damages. In our view, it is inconceivable that Congress chose to confer *carte blance* on private parties the power to invoke civil RICO whenever they can allege the existence of two illegal acts (but no convictions) and those acts fall within the definition of one or more of the predicate offenses listed in the statute.

Instead, we think it clear that Congress intended different limits. Faced with the impossibility of drafting precise language that would serve its purposes without providing opportunities for circumvention, it chose to rely on the courts to assure that civil RICO would be enforced in a way that furthered basic congressional intent. That judicial role necessarily involves the elaboration of standards for determining when plaintiffs have satisfied the requirements of section 1964(c) through a sufficient showing of an "injur[y] in [their] business or property by reason of violation" of the substantive RICO provision, section 1962. Such standards are not, as we have indicated, set out expressly in the statute. But in recognizing such standards, the courts would be performing their usual and appropriate function—"construing the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943). There is nothing novel about

interpreting a statutory "text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." *Id.* at 351. The alternative is not due deference to the legislature; it is abdication in the face of repeated applications of the statute that everyone concedes are outside the contemplation of Congress.[25]

This is especially true in view of the fact that Congress, while making very little about civil RICO explicit, pointed the way to limiting standards in the language it selected for the civil damages provision. As we have noted, that provision was modelled explicitly on the comparable language in section 4 of the Clayton Act.[26] Both provisions require an injury "by reason of" a substantive violation of the act. And in the Clayton Act context, this language has been interpreted by this Court as requiring an 'antitrust injury," defined as "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

The Second Circuit, following the lead of some

[25]The universality of this recognition was suggested when the Seventh Circuit in *Haroco* was constrained to concede that "it does not seem at all likely that Congress anticipated the application of civil RICO" to such cases, even as it approved that application. *Haroco v. American Nat'l Bank and Trust Co.*, 747 F.2d 384, 399 (7th Cir. 1984) (cert. granted, No. 84-822).

[26]15 U.S.C. 15 (providing that any "person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee") (emphasis supplied). *See also* 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff) (the addition of the damages remedy is "another example of the antitrust remedy being adapted for use against organized criminality").

earlier decisions,[27] held that the analogous "by reason of" language in section 1964(c) calls for a similar analysis of the fit between an injury and the policies incorporated in the RICO statute. In order to qualify for treble damages under such an approach, a plaintiff must do more than show that he sustained an injury that is somehow causally related to conduct that meets the technical requirements of section 1962.

He must show that the kind of injury he sustained was among those that Congress was seeking to prevent—injury resulting from conduct characteristic of organized crime.[28]

In our view, such an approach to civil damages under RICO is not only consistent with the statute, but the only way to apply the statute as it was intended.[29] Without a requirement of "RICO injury," the statute becomes a remedy that is out of control, benefiting plaintiffs and burdening defendants based simply on the fortuity of whether ingenious lawyers can somehow fit a commercial dispute within the remaining statutory requirements. It might be

[27]*E.g., Harper v. New Japan Securities Int'l*, 545 F. Supp. 1002 (C.D. Cal. 1982).

[28]This is quite different from saying that the statute can only be applied against "recognized" organized crime groups. Congress obviously intended RICO as a weapon against anyone taking on the general *characteristics* of organized crime. *See Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 21 n. 17 (2d Cir. 1983).

[29]The "liberal construction" provision in the statute does not suggest to the contrary. It provides that RICO "shall be liberally construed *to effectuate its remedial purposes.*" Pub. L. No. 91-452, 904(a), 84 Stat. 947 (1970) (emphasis added). This reference to the particular remedial goals pursued by Congress, if anything, *supports* an approach that limits RICO to its intended scope.

necessary, of course, to allow a statute to sweep beyond its intended scope in certain circumstances in order to assure that it is fully applied where Congress wanted it to be. But that is not the situation with civil RICO. In the absence of a meaningful injury limitation, the unintended applications will, as can readily be seen by viewing federal court dockets, vastly outstrip the intended applications.

There are currently vast numbers of civil RICO cases pending in federal courts. Few of them have anything to do with activities that are characteristic of organized crime. On the contrary, almost all involve commercial disputes, *see, e.g., Dan River Co., v. Icahn*, 701 F.2d 278 (4th Cir. 1983) (tender offer); *In re Catanella*, 583 F. Supp. 1388 (E.D. Pa. 1984) (securities fraud) (citing numerous cases), or traditional tort litigation, *see, e.g., Martin v. Frank*, appeal pending, No. 84-6028 (9th Cir.) (attorney malpractice); *Great Lakes Concrete Pole Corp. v. Eash*, appeal pending, No. 83-1464 (6th Cir.) (products liability) and common law fraud, *Armco v. SLT Warehouse Co.*, appeal pending, No. 84-1828, (5th Cir.).

The net effect, in short, is to sanction under civil RICO a wholesale displacement of the civil povisions of the federal securities laws as well as "the displacement of state tort law into the federal courts." *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). And all of this would be accomplished through a misinterpretation of a single sentence inserted into an organized crime bill without significant debate and without the slightest indication that Congress wanted it to happen.[30]

[30]The statistics of the Administrative Office of the United States Courts, cited by the Association of State Attorneys General at pgs. 22-23 of their amicus brief, are instructive. The numbers reveal that, "if most securities and fraud related cases were also RICO cases, RICO filing would not exceed 5,000, not more than 2% of all federal filings." id. pg. 23.

In this regard, it is pertinent to look at the *nature* of a "typical" RICO case as well as the absolute number of such cases. They are typically complex and involve high stakes in the commercial arena, not unlike securities and antitrust matters. Therefore, a broad reading of civil RICO might double overnight the courts' workload on time-consuming, complex, hotly contested commercial matters. This would increase the burdens on the District Courts all out of proportion to the relative percentage of "RICO-based" filings.

B. *Defining the Injury Requirement.*

The question becomes, therefore, whether it is possible to provide a workable understanding of "RICO injury," one that will allow it to operate effectively as a criterion separating appropriate and inappropriate invocations of civil RICO. There is no doubt that this is a formidable task. Even those courts that have enunciated a special injury requirement have disagreed on the appropriate definition of that requirement. *See* Pet. App. 21a (citing "competitive" and "racketeering" injury cases). Such definition will by necessity serve as the framework for a case-by-case application and refinement of the concept.

But this recognition hardly suggests that it would be better to avoid enunciating a standard altogether. There is nothing especially foreign to our jurisprudence about a standing rule that is defined with less than mathematical precision. For example, in the securities field, the task of defining the "purchaser-seller" requirement in fraud actions under the 1934 Act has been complex and difficult, and has

had to go forward without any express direction from Congress concerning the proper limits of the cause of action it created. But from its first clear articulation in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert denied*, 343 U.S. 956 (1952), to its most recent review in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), the concept has stood the test of time and become central to securities regulation theory and practice. The same is true of the concept of "antitrust injury" itself, which has required a period of evolution[31] but now plays a useful role in effectuating the intent of Congress in that field.

Still, even as to these limitations, which have existed for some time, there is no litmus test that can readily sort out the caes that are properly within the statute's ambit from those that are not. Instead, it is necessary for the federal courts to apply these basic concepts to the particular facts presented on a case-by-case basis. Such a process necessarily leads to legitimate disagreement in a few cases. But there is no justification for abandoning a rule that can easily sort out most cases simply because it is somewhat imprecise at its outer boundaries. The same criticism could be made with respect to many different legal principles that are subject to good-faith judicial application.

In view of this recognition, it becomes clear that the substantive provisions of the RICO statute, read in light of the legislative history, supply quite suffi-

[31]See *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, *supra*; *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982); *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

cient guidance for the development of a reasonable definition of "RICO injury." As we have suggested, the technical requirements for a violation of RICO set out in section 1962 are deliberatly flexible.[32] But to say that a statute is flexible is not the same as saying that it is silent. Even as it sought to limit the hurdles facing the Justice Department in putting together a RICO case, the Congress selected terminology which goes a long way toward indicating the kinds of cases in which the statute was to be used.

The central theme of section 1962 is that there must be an "enterprise" that is either acquired or operated through a "pattern of racketeering activity." These concepts are closely interrelated. Taken together, they capture much of the essence of what Congress meant when it set out to create a weapon agianst "organized crime."

With this preliminary understanding in mind, it is possible to focus on the particular circumstances in which such a pattern of activity can give rise to a RICO violation. There are two main criteria. First, a legitimate business can be "infiltrated" *by means of* a pattern of racketeering activity, 18 U.S.C. 1962(a), (b), and operated for criminal purposes, *id.* 1962(c). Here, the relevant criteria are neither obscure nor particularly controversial. The statute requires either that the business be bought with funds obtained through a previous pattern of racketeering, or that the acquisition itself be accomplished through a pattern of predicate acts like extortion, bribery, and so forth.

[32]This is especially true of section 1962(c), which, as this Court has recognized, *United States v. Turkette*, *supra*, applies to many different kinds of entities, as long as they are somehow involved in racketeering.

Where such an infiltration is accomplished either with funds stemming from a prior criminal history or by means of a pattern of criminal acts, there is, almost by definition, an example of the kinds of "organized crime" activities that Congress sought to attack. The very act of infiltrating a legitimate enterpise, combined with a series of related predicate offenses, carries with it a suggestion of systematic and professional criminality clearly within the intent of the statute.

As a result, we believe that "RICO injuries" include, to begin with, all harms caused directly by the infiltration of legitimate enterprise by habitual criminals or through criminal means. One such harm, of course, would be the "competitive injury" caused to competing businesses by the unfair tactics of an infiltrated enterprise—coercion of potential customers, bribery of public officials to obtain special advantages, destruction of competitiors' facilities, evasion of taxes in order to gain a competitive advantage, etc. But there are other possibilities as well.

Senator McClellan took the trouble to outline them in detail. Once a business is taken over. "[l]abor unions [may be] infiltrated" to the detriment of workers. Sometimes, "the mob bleeds a firm of assets, then takes bankruptcy," or it "steals securities and then uses the stolen securities to fraudulently obtain funds from lending institutions. 116 Cong. Rec. 591 (1970).

In sum, the *infiltration* criterion is relatively easy to define and the injuries arising out of such conduct are relatively easy to identify.

The second RICO paradigm, while somewhat less well-defined, is no less real. In light of this Court's decision in *Turkette*, it is clear that RICO applies not only to infiltrated legitimate enterprises but to wholly illegitimate ones. The next question therefore is: what are the hallmarks of a criminal enterprise that falls within the intended scope of RICO?

The answer, in our view, is that the enterprise must have enough of the central, generic attributes characteristic of "organized crime." This is not to say that in civil RICO plaintiff must allege a connection between the defendants and organized crime associations, *but he must show how the specified conduct is characterisitic of the acts engaged in by organized criminals.* These attributes are hard to set out with precision because, in the words of Congressman Poff, a RICO sponsor, organized crime "is a functional or sociological concept like white collar or street crime, serving simply as a shorthand method of referring to a large and varying group of individual offenses committed in diverse circumstances." 116 Cong. Rec. 35,344 (1970).

Nevertheless, the main characteristics of what Congress meant by "organized crime" can be described.

First, there must be a true "enterprise" engaging in a real "pattern" of conduct. To satisfy this criterion, it would be necessary to demonstrate the existence of similar kinds of crimes committed by the same groups of people, a well-established internal hierarchy, a system of organizational discipline, and other similar characteristics. As the Court put it in *Turkette*, a criminal "enterprise" is "proved by

evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." 452 U.S. at 583.

Second, it is also necessary to evaluate the substance of the particular criminal acts at issue. Conduct characteristic of organized criminal behavior exists along a continuim, from actions quintessentially criminal to acts almost indistinguishable from those which are the grist of civil commercial disputes in the modern age.

On one end of this continuim are most of the acts proscribed in Sec. 1961 (1)—murder, kidnap, arson, extortion, narcotics trafficking and the like. Closely aligned to these are proscriptions of such predicate acts as bribery and labor racketeering, which were considered, not only by the drafters but by the various committees of Congress for nearly two decades before the law was exacted. These reach at the heart of Congress' concerns regarding organized crime—force, coercion, and corruption of the marketplace and our political institutions.

Aligned at the distant end of this spectrum are the acts which ironically have formed the basis for the overwhelming number of Civil RICO suits—"mail fraud", "wire fraud", and securities "violations". These represent conduct which *may* be viewed as relatively ambiguous, when compared with those acts which are the essential badges of organized criminals. The plaintiff relying on such predicate acts would therefore have to alledge "something more " a connection to violence, corruption of labor or the public fisc, or perversion of civil or regulatory process.

While not airtight, these basic principles for determining whether a case properly involves RICO injury provide a sensible approach. They insure that the civil remedy is limited to situations involving activities that RICO sought to stamp out. They will prevent the gross misuse of the law which has occurred in the lower federal courts.

Indeed, the usefulness of these guiding principles can be readily illustrated by applying them to the facts of *Haroco* and this case. First, in neither case is there any indication of infiltration into legitimate enterprise by criminals seeking control. Neither the bank in *Haroco* nor the Imrex Company ever became the agents of persons with pre-existing patterns of criminality. Second, neither company took on any of the characteristics of a criminal "organization" or committed acts that suggest that they had become functionally comparable to organized crime syndicates. Instead, what we have here are two conventional and legitimate businesses that are alleged to have committed certain acts of fraud, one in its commercial dealings with customers, and one in its dealings with a single coventurer. These cases represent as well as any could the problems that would arise in the absence of a meaningful "RICO injury" requirement. They are cases where the RICO civil damages remedy has become an instrument exploited by plaintiffs who cannot possibly claim injuries caused by the particular depredations which the Congress sought to eliminate from the life of the nation.

III. THE STRUCTURE OF THE RICO STATUTE REVEALS THAT CONGESS EXPECTED CIVIL SUITS TO BE BROUGHT ONLY AFTER DEFENDANTS HAVE BEEN CONVICTED OF THE UNDERLYING PREDICATE ACTS.

The Second Circuit further held that a treble damages suit under RICO may only be brought after the defedant has been convicted criminally of the predicate offenses on which the plaintiff seeks to rely.[33] Conceding that the statutory language is ambiguous on this point, the court relied primarily on the unique structure of civil RICO as a cause of action premised on a showing of previously committed *crimes*, and the attendant problems that would rise if plaintiffs were allowed to prove such crimes civilly. Pet. App. 38a-41a. It found no evidence that Congress deliberately created a civil cause of action with such inherent difficulties. On the contrary, it showed how the entire remaining structure of the statute reveals an assumtion that RICO targets have been or are being, convicted of crimes in duly conducted criminal proceedings. Pet. Ap.. 37a, 4la-44a.

This ruling, in our view, rests on a correct analysis of the statute and its underlying intent. To be sure, the alternative approach—allowing plaintiffs to put their opponents on trial for crimes—is not ruled out by the statutory language itself, but neither is it compelled. The process of statutory intepretation therefore must turn on which approach best conforms to the basic structure of the statute, of which the civil remedy is only one part.

[33]The court also held that the plaintiff could proceed on the basis of a prior *RICO* conviction. Pet. App. 42a.

As we have discussed, RICO was intended to be a flexible tool for *prosecutors* in their war against organized crime. The sanctions provided were deliberately ruinous.[34] but Congress believed that this was a justified way of dealing with persons who had a proven history of criminal conduct and had helped to produce the particular social harms caused by organized crime. The main protection against the abuse of such ruinous sanctions was reliance on the good judgment of the Department of Justice.

The civil remedy, with its own rather draconian sanction, was inserted into the bill at the last minute, and without much thought about its consistency with the overall structure. As we have already argued, Congress must at least have intended the courts to match the discretionary judgments asked of prosecutors with substantive limitations on the civil suits in which RICO could be invoked. Without the recognition of such a "RICO injury" doctrine, the reach of civil RICO would be essentially unchecked.

But we would go further. A similar analysis of the structure and history of RICO also provides convincing evidence that Congress intended any invocation of civil RICO to be preceded by some exercise of prosecutorial discretion—even if only with respect to the question of prosecution for the underlying predicate

[34]*United States v. Turkette, supra*, 452 U.S. at 591-93. *See, e.g.*, 116 Cong. Rec. 602 (1970) (remarks of Sen. Hruska) ("the combination of criminal and civil penalties in this title offers an extraordinary potential for striking a mortal blow against the property interests of organized crime"); *id.* at 35193 (remarks of Rep. Poff) (RICO "will deal not only with individuals, but also with the economic base through which these individuals constitute such a serious threat to the economic well-being of the Nation").

offenses. In other words, Congress did not intend any application of RICO to persons who were not proven criminals. And it revealed that intent by making the commission of crimes a central element of any RICO violations.

Section 1964(c) provides for civil damages whenever a person is injured "by reason of a violation of section 1962." Section 1962, in turn, bars the acquisition or operation of an "enterprise" through a "pattern of racketeering activity." And "racketeering activity,'" is defined in section 1961(1) as (1) any of a number of specified criminal acts "chargeable under State law," (2) any act which is "indictable" under the federal laws governing bankruptcy, securities fraud, and narcotics trafficking. Petitioner, of course, makes much of the fact that the statute refers to acts that are "chargeable" or "indictable," arguing that the plain language authorizes civil plaintiffs to prove the occurrence of predicate crimes that have never been actually prosecuted but *could* be. Pet. Br. at 11-16.

Before jumping to this conclusion, however, it is important to realize that section 1961 was drafted long before the civil RICO provision was added. As written, therefore, section 1961 was part of a statute that provided exclusively for governmental enforcement.

What Congress had in mind were federal RICO prosecutions where there could not sensibly be a requirement of prior state or federal convictions on the pedicate acts. On the contrary, it is well established that federal prosecutors may prove the commission of predicate offenses in the same criminal trial in which they seek to prove a violation of RICO. *See* Pet. App.

38a. As a result, it made perfect sense for Congress to define "racketeering activity" in terms of "chargeable" or "indictable" acts.

The issue here thus boils down to whether Congress intended a different sequence of events when, later in the legislative process, it inserted the civil damages provision. We think it did.[35]

The evidence of this assumption is not hard to discern. First and most importanly, there is the fact that Congress went out of its way to define the elements of a RICO violation, not in terms of certain forms of bad conduct, but in terms of the commission of pre-existing criminal offenses. This legislative decision made sense, of course, since the goal was to attack those involved in organized *crime.*

RICO was thus deliberately predicated on the status of being a "criminal," a status that traditionally comes about not only after a person has violated the law but also after a prosecutor has made the discre-

[35] As the Second Circuit noted, Pet. App. 29a-31a, a number of courts have rejected a prior conviction requirement. But most of those decisions stem from the ruling in *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975), involving the issue of injunctions sought by the *government* against persons who had no prior convictions. Obviously, the question of such a civil action by the same prosecutors who could bring a RICO prosecution at any time is very different from the question of privately initiated damage suits. In this regard, we note that the injunctive provisions in 1964 were in the RICO bill long before the civil damages provision was added by the House.

tionary decision to prosecute'" and there has been a full oportunity for a criminal trial. That being true, it simply makes no sense to conclude that Congress ever imagined that a civil court would determine, in a privately initiated and conducted lawsuit, that the defendant was a "racketeer" guilty of intentional violation of criminal statutes.

The flaw in the argument for a "no-conviction" reading of civil RICO is the assumption that the elements of the cause of action make no real diference—*i.e.*, that civil RICO is not significantly different from other federal damage remedies, such as those under the Clayton Act or the securities laws. To begin with, those statutes do not define the basis for violations specifically in terms of existing criminal offenses. They rest instead on a proscription of specific kinds of conduct that may, in certain circumstances, also be criminal. Moreover, while it may be true that the financial implications of a civil action are comparable in each instance, it is impossible to ignore the

[36]A contrary rule would contravene at least the spirit of the well-recognized rule that only a prosecutor in the Executive Branch may determine whether to initiate and pursue the prosecution of a criminal offense. *See United States v. Cox*, 342 F.2d 167, 171 (5th Cir.) (*en banc*), *cert. denied*, 381 U.S. 924 (1965).

There is also a danger that allowing plaintiffs to initiate civil actions on their own will invade the province of prosecutors in another way. Once a defendant has lost a civil RICO case, it is predictable that all sorts of informal pressure may be brought to bear on the prosecuting authorities to follow up this verdict with a prosecution of the same "proven" criminal.

Indeed, it is entirely possible that the prosecutor might seek to rely on the doctrine of affirmative collateral estoppel against the defendant in such a situation. On the other hand, if the defendant prevails in the civil suit and is then indicted by the prosecutor, he may seek to raise double jeopardy objections.

special character of a finding of RICO liability. To the world, a losing civil RICO defendant has suddenly been "proved" to be a criminal. Furthermore, when the appropriate criteria are used to measure the scope of the statute, the punitive nature of civil RICO becomes abundantly clear. These criteria were outlined in *Kennedy v. Mendoza Martinez*, 372 U.S. 144 (1963) and discussed again, with approval, in *United States v. Ward* 448 U.S. 242, 100 S. Ct. 2636 (1980). Among the characterisitics of a penal (punitive) statute, as opposed to a regulatory or remedial law are: (1) whether the sanction includes an affirmative restraint upon the defendant, (2) whether or not the sanction which may be invoked by the law is historically regarded as punishment, (3) whether or not there is a requirement of scienter in the component acts, (4) whether retribution and/or deterrance are a goal of the statute's operation, and (5) whether the behavior referenced in the statute's sanctions is already a crime. In sum, all the basic concepts and structure of civil RICO lead to the conclusion that it was intended to be *punitive* in application.

It is indeed difficult to reconcile the clearly punitive structure and scope of the civil remedy with the notion that such a RICO case may be proved by a mere preponderance of the evidence, in a civil trial, especially when it will typically allege as predicate acts mail fraud or wire fraud, offenses subject to elastic interpretation and broad application.

As a result, the most plausible interpretation of civil RICO is that Congress intended a defendant to have the same benefit that is available to every criminal RICO defendant—a chance to defend against the charged predicate offenses in a criminal pro-

ceeding where he can avail himself of the full panoply of rights and protections that are uniquely ganted to criminal defendants.[17] That chance can be assured only if civil RICO is limited to persons already convicted of the underlying offenses.

Such a rule would be a natural complement to the RICO injury requirement, becaue it too would guard against the trivializing of the statute.The requirement of a proper prosecution and conviction, while imposing no new substantive limitation on the persons who may be sued civilly under RICO, would help to prevent application of the statute in cases were only the most creative plaintiffs' lawyer would discern criminality. Many criminal statutes, including some listed in section 1961, are phrased broadly, but a responsible prosecutor will limit his efforts to cases where the violation is clear and the consequences serious. In the absence of a prior-conviction rule, however, potential plaintiffs, hopeful of conjuring up a claim for treble damages, can be trusted to take just the opposite approach. And juries, knowing that the "punishment" for the "crime" is a damage award—not a jail sentence—may find merit in a case that would come out otherwise if it were truly tried as a criminal prosecution.

Some pertinent practical criticisms of the prior conviction requirement have been advanced by peti-

[17] *U.S. v. One Assortment of 89 Firearms*, 104 S.Ct. 1099 (1984), cited by petitioner, does not require a ruling to the contrary. That case restated the rule that a prior *acquittal* in a criminal case *does not prevent* (either by way of collateral estoppel or double jeopardy), the subsequent prosecution of a remedial civil suit requiring proof of related facts. That is not the requirement of a civil RICO action, *where the criminal conduct itself is an element of the proof.*

tioner. First, it argues that the prior conviction rule would unduly affect criminal prosecutions. The argument is that a link between convictions and civil RICO claims, by giving victims a financial stake in successful prosecutions, would lead to undue pressures on prosecutors and, at the same time, compromise those victims when they appear as witnesses in criminal trials. Pet. Br. at 25-26. But there is no reason to believe that the financial stake of potential RICO plaintiffs would be materially different from that of any other person who has a potential tort claim that might also be prosecutable. In every such case, the victim's chances of winning punitive damages, comparable to RICO treble damages, in his civil recovery will be much improved if there has been a successful prior prosecution. But the criminal-justice system still leaves the *prosecutors* the power to decide whether to prosecute, and relies constantly on complaining witnesses with potential tort claims. Indeed, prosecutors regularly rely on witnesses who are much more thoroughly "compromised," such as co-conspirators who have turned state's evidence.

These facts are also sufficient to dispose of petitioner's next argument—that it would be unfair to prevent civil RICO claims in cases where prosecutions are barred on Fourth Amendment or similar grounds, or are terminated by pleas to non-predicate act crimes. Pet. Br. at 26. If there is nothing unusual or inappropriate about allowing prosecutors to control the cases in which RICO treble damages are available, it is equally unexceptional for claims to be barred where prosecutors choose to accept pleas or simply are unable to prove their case, for whatever reason. Indeed, the link between predicate-act convictions and

treble damages may provide a useful new weapon to the arsenal of prosecutors.

Finally, there is the complaint that a prior-conviction rule would alter the statute of limitations or split off RICO causes of action from related state-law claims. Pet. Br. at 27. These arguments depend on the premise that there is something wrong with having a civil RICO claim triggered by an event—conviction—that comes later than the predicate act and may come after the completion of a related state civil suit. However, other than raising misleading questions about the danger of giving plaintiffs two "days in court", petitioner offers no basis for the notion that it would be unworkable to hinge a federal civil claim on a criminal conviction.

In sum, the "most logical conclusion to be drawn is that Congress expected the criminality of the predicate acts to be proved before the private action went forward—that a criminal conviction must precede a private civil suit." Pet. App. 40a. The civil damage remedy was never perceived as more than an adjunct of the prosecutorial provisions included in this criminal statute. The intent of Congress can be most effectively implemented if prosecutors are left some role in determining when a civil case may be brought, and civil defendants are given the right to defend against charges of criminality in a *criminal* proceeding.

CONCLUSION

For these reasons, the decision of the Second Circuit should be affirmed.

Respectfully submitted,

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STATEMENT PURSUANT TO RULE 28

Imrex Company, Inc. has no parent or subsidiary companies. Imrex Sales Corp. is an affiliate. Imrex Aerospace Corp. is an affiliate.

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SEDIMA, S.P.R.L.,

Petitioner,

—v.—

IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The Securities Industry Association (the "SIA") respectfully moves, pursuant to Rule 36 of this Court, for leave to file the attached brief as *amicus curiae* in support of respondents. A copy of respondents' consent to SIA's submission of this brief is being filed concurrently herewith. Consent of petitioner, although requested, was not granted.

The SIA is a trade association which represents more than 500 securities firms in the United States and Canada. Its members include investment banks, brokers, dealers and mutual fund companies, as well as other firms functioning on the floors of exchanges. SIA members are active in all exchange and over-the-counter markets and in all phases of corporate and public finance and account for approximately 90% of the securities business in North America.

This case, while not involving claims arising from securities transactions, raises far-reaching questions concerning the proper scope and interpretation of private civil RICO, the resolution of which will have significant impact on participants in the securities markets. With increasing frequency, private civil RICO claims are being included in complaints arising from securities transactions. An interpretation of 18 U.S.C. § 1964(c) consistent with the interpretation of the Second Circuit would accord with the intent of Congress when it enacted RICO and would remove the threat that participants in the securities markets, among others, will be forced to defend inappropriate and abusive litigation.

Members of the SIA, therefore, have a vital interest in this case. In substantial part, this brief will show that the misguided application of private civil RICO threatens to undermine well established statutory and judicial principles applicable to claims involving participants in the securities markets. Because the claims in this case do not arise from securities transactions, it is unlikely that the parties will address this issue in any detail. Moreover, we do not believe that any other *amicus* will focus, to a similar degree, upon the interrelationship between private civil RICO and the federal securities laws.

WHEREFORE, it is respectfully requested that this Court grant the SIA permission to file the attached brief as *amicus curiae*.

Dated: March 29, 1985

Respectfully submitted,

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IN THE

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OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Securities Industry Association (the "SIA") submits this brief as *amicus curiae* in support of respondents. The SIA urges this Court to adopt an interpretation of private civil RICO[1] consistent with the principles set forth by the United

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1 "RICO", an acronym for "racketeer influenced corrupt organizations," refers to Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922, as codified in 18 U.S.C. §§ 1961 *et seq.* "Private civil RICO" refers to 18 U.S.C. § 1964(c), which authorizes civil actions for treble damages at the instance of private parties.

States Court of Appeals for the Second Circuit in *Sedima, S.P.R.L.* v. *Imrex Co.*, 741 F.2d 482 (1984). As relevant here, the statutory language, structure and purpose of 18 U.S.C. § 1964(c) should be held to require private parties to show that defendant was engaged in systematic criminal activity in violation of § 1962 and that, as a result, an injury was sustained which was different in kind from that attributable to the underlying predicate acts. For convenience, this showing shall be referred to as "a distinct RICO injury."

The SIA is a trade association which represents more than 500 firms engaged in virtually all aspects of the securities business. Its membership (which includes investment banks, brokers, dealers, mutual fund companies and specialists) is active in all exchange and over-the-counter markets and in all phases of corporate and public finance. As a group, SIA members account for approximately 90% of the securities business in North America.

The SIA's interest in this case stems from the widespread, and growing, practice of including private civil RICO claims in commercial litigations, such as those arising from securities transactions. As to such transactions, the threat of treble damage liability is both inappropriate and unnecessary when viewed in the context of the existing legislation specifically directed at participants in the securities markets.

The issuance of and trading in securities is one of the most closely scrutinized activities in the American economy. The activities of SIA members are monitored by federal, state and industry enforcement agencies and are subject to regulation under a wide variety of federal and state statutes. The ability of SIA members to do business depends upon the trust of the investing public. That trust is needlessly jeopardized when established institutions are routinely stigmatized as engaging in racketeering.

Because of the impact of private civil RICO on participants in the securities markets, the SIA has a vital interest in *Sedima* as well as in *Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3506 (Jan. 15, 1985) (No. 84-822), even though neither of these cases arises from a securities transaction.[2] As shown below, this Court should adopt a distinct RICO injury requirement consistent with the principles set forth by the Second Circuit in *Sedima* and in *Bankers Trust Co.* v. *Rhoades*, 741 F.2d 511 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3367 (Oct. 24, 1984) (No. 84-657).[3]

SUMMARY OF ARGUMENT

The Second Circuit correctly read § 1964(c) to require private parties to allege a distinct RICO injury in order to state a claim for relief. That injury must be related to systematic criminal activity by defendant in violation of § 1962 and must be different in kind from that attributable to the underlying predicate acts. This requirement, which is consistent with the language and structure of the statute, avoids the displacement of carefully formulated federal legislation such as that regulating participants in the securities markets.

In contrast, the Seventh Circuit's rejection of a distinct RICO injury requirement rests on a misreading of the language of § 1964(c) and a misunderstanding of the role of courts in interpreting a statute in the face of a virtual silence in its

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2 *See Sedima*, 741 F.2d at 496 n.41: "We do not in this business fraud case attempt to define the scope of the standing requirement when the RICO suit is based upon securities law violations."

3 The SIA also believes that, as held by *Sedima*, no private action should be maintainable under § 1964(c) unless the defendants have been criminally convicted. This issue was not addressed in *Bankers Trust*, 741 F.2d at 516 n.5, or in *Alexander Grant & Co.* v. *Tiffany Industries, Inc.*, 742 F.2d 408, 413 n.11 (8th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3541 (Jan. 2, 1985) (No. 84-1084); *see also Haroco* (747 F.2d at 393 n.12), noting that *Sedima*'s criminal conviction requirement conflicts with *Bunker Ramo Corp.* v. *United Business Forms, Inc.*, 713 F.2d 1272, 1286-87 (7th Cir. 1983).

The SIA supports the position respecting the criminal conviction requirement set forth in the *amicus* brief of the American Institute of Certified Public Accountants.

applicable legislative history. In the circumstances presented here, it is the responsibility of the courts to harmonize private civil RICO with the existing legal landscape so as to effectuate Congressional intent. Recognition of a distinct RICO injury requirement would fulfill that responsibility.

ARGUMENT

I

ALLEGATION OF A DISTINCT RICO INJURY IS REQUIRED BY THE LANGUAGE AND PURPOSE OF THE STATUTE

The present controversy arises from a deceptively simple provision authorizing suits by private parties. The private civil RICO provision, set forth in 18 U.S.C. § 1964(c), was added to a statute designed for use by federal law enforcement agencies in fighting organized crime. Section 1964(c) states:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

In authorizing claims by private parties, § 1964(c) differs radically from the criminal and public civil provisions of RICO. These are enforceable solely on the initiative of the Department of Justice, which has promulgated a strict set of guidelines governing the commencement of actions by federal authorities.[4] This internal policy-making has obviated the

4 Department of Justice RICO Guidelines, *United States Attorneys' Manual*, Tit. 9, Ch. 110 (adopted Jan. 30, 1981), *reprinted in* 5 Trade Reg. Rep. (CCH) ¶ 50,452. *See Sedima*, 741 F.2d at 497. Among other things, the Guidelines ensure that RICO receives "particularly careful and reasoned application," and that it is not used "far afield from [its] Congressional purpose." The Guidelines also discourage RICO indictments "which merely duplicate the elements of proof of a traditional Hobbs Act, Travel Act, mail fraud [or] wire fraud" case. At the same time, they require centralized authorization from the Department of Justice before a RICO criminal or public civil case can proceed.

danger of inappropriate or overbroad application of the criminal and public civil provisions.

By its terms, § 1964(c) limits the possibility for recovering treble damages to one class of private parties: those "injured . . . by reason of a violation of section 1962." As set forth in *Sedima*, this provision

> "carries with it at least . . . the obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." 741 F.2d at 496.

Thus, a private party must show both that defendant was engaged in systematic criminal activity in violation of § 1962 and that, as a result, an injury different in kind from that attributable to the underlying predicate acts was sustained.

A. Private Parties Must Show That Defendant Violated § 1962 By Engaging In Systematic Criminal Activity

The need for a showing of systematic criminal activity is supported by the articulated purpose for which RICO was enacted and by accepted standards of statutory interpretation.

In the Statement of Findings and Purpose which prefaces the Organized Crime Control Act, Congress made clear that its objective in enacting the statute was the elimination of "organized crime." After an extensive recitation of five findings of fact relating directly to the power and danger of "organized crime," Congress concluded:

> "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establish-

ing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime."

This Court has previously indicated "that the legislative history forcefully supports the view that the major purpose of [RICO] is to address the infiltration of legitimate business by organized crime." *United States* v. *Turkette*, 452 U.S. 576, 591 (1981).

The specific goals of Congress in enacting RICO can be effected by the judicial development of standards restricting § 1964(c) to the kinds of systematic criminal activity at which RICO is directed. At a minimum, these standards should require a showing that

1. defendants are associated with a larger criminal organization which has a well-defined hierarchy and structure;

2. to insulate itself from interference, the organization uses violence, intimidation and bribery;

3. the proceeds of its activities are covertly disposed of by illegitimate means or are reinvested in other criminal operations.[5]

The operative criminal sections of RICO do not require that defendants be shown to have an affiliation with organized crime. Apparently this is because some members of Congress were concerned that inclusion of a specific reference to organized crime in the criminal sections might encourage a constitutional challenge on the ground that such a reference would create a so-called status offense. *See, e.g.*, 116 Cong. Rec. 35344 (1970) (remarks of Rep. Poff). However, this

5 *See Moss* v. *Morgan Stanley Inc.*, 553 F. Supp. 1347, 1359-60 (S.D.N.Y. 1983), dismissing a § 1964(c) claim. Although it affirmed that dismissal, the Second Circuit in dictum disagreed with the conclusion of the District Court that a "connection with organized crime" should be viewed as an element of § 1964(c). *Moss* v. *Morgan Stanley Inc.*, 719 F.2d 5, 21 (2d Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 1280 (1984). After *Sedima*, the continued vitality of this dictum, even in the Second Circuit, is doubtful.

concern is irrelevant to the question whether systematic criminal activity should be a prerequisite to claims by private parties under § 1964(c).

A criminal statute will be held to create a status offense only if, without regard to conduct, it subjects an individual to sanctions merely because he joins a particular group or suffers from an undesirable condition. *See, e.g., Robinson* v. *California*, 370 U.S. 660 (1962). However, no status offense is created if, in addition, the statute also requires proof that the individual had a specific intent to further the unlawful purposes of the group or that he failed to submit to appropriate remedial treatment for his condition. Such a statute is constitutional because it punishes conduct, not status. *See Scales* v. *United States*, 367 U.S. 203, 224-28 (1961).

The legislative history of § 1964(c) contains no indication that any member of Congress was concerned over the creation of a status offense in relation to private civil RICO. Indeed, it is undisputed that civil statutes may properly limit liability to members of groups which pursue unlawful goals so long as, in addition, the individual member is shown to have "held a specific intent to further those illegal aims." *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982).

Accordingly, Congressional concern about the creation of a status offense, even if relevant to the interpretation of the criminal provisions of RICO, should not, in any way, affect the propriety of holding that systematic criminal activity is an essential element of a claim under § 1964(c).

B. Private Parties Must Show Injury Different In Kind From, Or Not Simply Caused By, The Underlying Predicate Acts

This component of a distinct RICO injury requirement derives directly from the statutory language. Treble damages can only be recovered upon proof of injury "by reason of a violation of section 1962," the core criminal provision of RICO.

Section 1962 declares unlawful (a) an investment of income derived from a "pattern of racketeering activity" in any enterprise[6] that is engaged in interstate commerce; (b) the acquisition of such an enterprise through a pattern of racketeering activity; (c) the conduct of such an enterprise's affairs through a pattern of racketeering activity; or (d) the conspiracy to do any of the foregoing acts.

"Racketeering activity" is defined as the commission of certain federal or state offenses specified in § 1961(1). These are commonly referred to as "predicate acts." Under § 1961(5) a " 'pattern of racketeering activity' requires at least two acts of racketeering activity" within a ten-year period. The use of the term "requires" rather than "means" in § 1961(5) indicates that proof of two predicate acts constitutes a minimum threshold for RICO liability. Because the statute does not *define* two acts as a "pattern", it leaves the definition for judicial interpretation and development. As one of RICO's principal sponsors explained, "proof of two acts of racketeering activity, without more, does not establish a pattern." 116 Cong. Rec. 18940 (1970) (remarks of Sen. McClellan).

When the relevant statutory provisions are read together, a "violation of § 1962" signifies both a pattern of predicate acts and the use of that pattern to invest in, acquire or conduct the affairs of an enterprise.

Although the aim of the statute is unmistakably at the pattern, not at the individual acts, a pattern in itself does not constitute "a violation of section 1962." A violation occurs only if the pattern is used to invest in, acquire or conduct the affairs of an enterprise. Private parties can therefore recover only if injured as a result of the existence and use of such a pattern. The converse is equally true. Private parties cannot recover if injured only as a result of the underlying predicate acts.

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6 An " 'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

Those who favor a broad employment of § 1964(c) challenge requirement of a distinct RICO injury as overly complex. However the sharp distinctions drawn by the statutory language cannot lightly be disregarded. The purpose of § 1964(c) was not to provide enhanced penalties of a civil nature for a random list of criminal acts which were already proscribed. Rather, as recognized by the Second Circuit in *Sedima* and *Bankers Trust* and by the Eighth Circuit in *Alexander Grant*,[7] § 1964(c) was enacted to provide a remedy only for those who had suffered a distinct RICO injury.

II

A DISTINCT RICO INJURY REQUIREMENT HARMONIZES § 1964(c) WITH EXISTING LAW

As shown above, the requirement of a distinct RICO injury is supported by the statutory language and structure. However, because the language of a statute is only the starting point for determining its scope, expressions of Congressional intent, as recorded in the legislative history, usually are consulted next. But the history of § 1964(c) fails to provide any relevant guidance: the simple fact is that Congress devoted almost no attention to private civil claims when it considered RICO.

In the face of the "clanging silence of the legislative history" of § 1964(c) (*Sedima*, 741 F.2d at 492), courts must turn to well established principles to define the scope of this provision in a manner consistent with other applicable law. The strictest attention to this judicial imperative is mandated because § 1964(c) might otherwise be read to infringe on areas already subject to pervasive federal regulation and because its unbridled application threatens to undermine the principle of limited federal jurisdiction.

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7 The Eighth Circuit viewed its decision as consistent with *Bankers Trust* even though it noted that *Bankers Trust* established a higher standard of pleading. It did, however, state that *Sedima*'s injury requirement was contrary to its earlier holding in *Bennett* v. *Berg*, 685 F.2d 1053 (8th Cir. 1982), *on reh.*, 710 F.2d 1361 (*en banc*), *cert. denied*, ___ U.S. ___, 104 S.Ct. 527 (1983).

A. The Legislative History Is Silent On The Scope Of § 1964(c)

In commenting upon the legislative history of private civil RICO, *Sedima* (741 F.2d at 492) stated:

> "The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of section 1964(c). If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have *discussed* it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws—involving decades of statutes, regulations, commentaries, and jurisprudence—it would at least have *mentioned* it. The House Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its possible implications."

See also Haroco, 747 F.2d at 390, 393:

> "It is true that the legislative history includes relatively little material on RICO's private civil remedy.
>
> * * *
>
> [*Sedima's*] review of the history shows convincingly that the private civil RICO provisions of section 1964(c) received relatively little attention from Congress in the enactment of the omnibus Organized Crime Control Act. The issue is what conclusions should be drawn from that fact."

A private damages provision was not part of the bill originally passed by the Senate. It was added in the House Judiciary Committee, which offered only the following explanation when the amended bill was brought to the House floor:

> "Title IX is designed to inhibit the infiltration of legitimate business by organized crime. In addition to creating new Federal offenses punishable by traditional criminal sanctions . . ., title IX also creates civil remedies modeled on those found in the antitrust field. These include orders of divestment, prohibition against business activity and orders of dissolution or reorganization, and treble damage suits on the part of private parties who are injured." 116 Cong. Rec. 35196 (1970) (remarks of Rep. Celler).

The amended bill was subsequently adopted by the Senate without any discussion.

Because of the total absence of an affirmative statement that private civil RICO relief should be broadly available, those who favor an expansive interpretation argue that Congress' *inaction* after hearing a critic's objection should be viewed as indicating a positive adoption of the objectionable interpretation. Thus, petitioner in *Sedima* (Br. at 39-40) quotes a statement by three opponents of § 1964(c) claiming that the section provided an " 'invitation for disgruntled and malicious competitors to harass innocent businessmen engaged in interstate commerce.' " Petitioner suggests that, by subsequently adopting the statute, Congress intended to leave private civil RICO without any limitations. However, the fears and doubts of the opponents of legislation have repeatedly been rejected as an authoritative guide to its construction. *Selective Service System* v. *Minnesota Public Interest Research Group*, ___ U.S. ___, 104 S.Ct. 3348 (1984); *Schwegmann Brothers* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394 (1951); *see also Sedima*, 741 F.2d at 490 n.22.[8]

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8 There is further reason to conclude that Congress did not intend the massive growth of civil litigation in the federal courts which has resulted from an expansive reading of § 1964(c). A few months before the enactment of RICO, a bill was passed that created 58 new federal district judgeships. As the House Report to Senate Bill 952 (Pub. L. 91-272, codified in 28 U.S.C. § 133) makes plain, Congress was fully aware in 1970 of "the delay and confusion" in the district courts. The House Report noted with concern the "record backlogs" caused by the

B. The Development Of Standards For Private Civil RICO Is An Appropriate Responsibility Of The Courts

Congress failed to supply explicit standards for applying § 1964(c). This fact does not, as the Seventh Circuit apparently believed, support the conclusion that Congress intended that there be no standards at all. Rather, in such circumstances, courts traditionally act to limit the scope of statutes to the objectives Congress clearly identified and expressly sought to achieve. Thus, under the federal antitrust laws, judicially developed standing requirements limit relief only to injuries which flow "from that which makes defendants' acts unlawful." *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In other words, there must be a causal connection between the antitrust violation and the harm suffered. *See, e.g., Associated General Contractors, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983).

When the alleged injury results solely from a tort or a breach of contract, no antitrust claim is stated. Thus, in *A.D.M. Corp.* v. *Sigma Instruments, Inc.*, 628 F.2d 753, 754 (lst Cir. 1980), " 'mere' unfair business practices or business torts," such as disloyal acts by corporate officials, did not state an antitrust claim. Similarly, in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981), a breach of contract claim, allegedly related to anti-competitive activities, lacked an "essential connection" with the antitrust laws because the contract itself was not violative of those laws. *See also Fields Productions, Inc.* v. *United Artists Corp.*, 432 F.2d 1010 (2d Cir. 1970) (*per curiam*), *aff'g* 318 F. Supp. 87 (S.D.N.Y. 1969), *cert. denied*, 401 U.S. 949 (1971), rejecting a claim because the cause of plaintiff's injury was not an antitrust violation—blockbooking of motion pictures—but was an improper allocation of profits.

"sharp" increase from the preceding year of both civil and criminal filings. 1970 U.S. Code Cong. & Ad. News 3221, 3224.

It cannot be assumed that Congress, at the same time it was actively seeking to solve the problem of severely overcrowded dockets, would, without comment or explanation, enact legislation dramatically expanding the *civil* jurisdiction of the federal courts to encompass cases normally—and competently—handled by other courts.

This analytical process should be used to identify claims not properly within the scope of § 1964(c), such as those resting on nothing more than alleged acts of mail fraud or wire fraud and lacking any relationship to the wrongful conduct which Congress explicitly stated it was remedying. The use of this process cannot be assailed on the ground that Congress declined to place RICO, which was designed to ruin racketeer-controlled enterprises,[9] in the antitrust laws, which were designed to enhance competition and to protect "economic freedom." *Associated General Contractors, supra*, 459 U.S. at 538.[10]

C. Well Established Principles Support A Narrow Interpretation Of § 1964(c)

When a broad reading of a statute would lead to unanticipated results, legislative intent has been determined "not by the letter of the law" but by its "spirit." Such a determination takes into account not only the presence or absence of relevant legislative history but also the historical matrix from which the

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9 *See Furman* v. *Cirrito*, 741 F.2d 524, 532 (2d Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3343 (Oct. 15, 1984) (No. 84-604). *See also Russello* v. *United States*, 464 U.S. 16, 104 S.Ct. 296, 303 (1983) (RICO was enacted "to remove the profit from organized crime by separating the racketeer from his dishonest gain.").

Some have argued that a distinct RICO injury requirement would inhibit the ability of the public to recoup damages from seriously corrupt entrepreneurs. But efforts to eliminate systematic corruption will not be impeded if private civil RICO is applied in the manner suggested in this brief. Wrongdoers may, as always, still be pursued under other applicable statutes. In any event, the asserted needs of public attorneys do not justify an overbroad reading of RICO in a way that would improperly affect the rights of private parties.

10 As stated by *Sedima*, 741 F.2d at 495:

> "On the other hand, there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language. By borrowing language imposing a standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO."

statute arose and the evil it was designed to remedy. *United Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892); *see also Sedima*, 741 F.2d at 488 n.17. A particular sensitivity to context, both historical and statutory, is shown when the broad application of a general statute would disrupt an established regulatory scheme or disturb the traditional allocation of state and federal jurisdiction.

A decision to read a statute narrowly must be made when, as here, a broad reading would be inconsistent with other—and more specifically drawn—statutes. Thus, when one statute thoroughly regulates a particular field, and a broader statute regulates a more general field—arguably including the particular one—the particular field is properly held beyond the reach of the broader statute, absent expressions of Congressional intent to the contrary. *See Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976) (broad venue provisions inapplicable in actions against national banks): "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum."[11]

For similar reasons, *Train* v. *Colorado Public Interest Research Group*, 426 U.S. 1, 23-24 (1976), held that nuclear materials were not subject to regulation by the Federal Water Pollution Control Act (the "FWPCA"), even though, on its face, FWPCA appeared to encompass such materials. Pointing to the pervasive regulation of nuclear materials by the Atomic

11 *Cf. United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976), where it was held that an amendment to the Suits in Admiralty Act did not authorize the bringing of claims which were otherwise barred by the Public Vessels Act. In the absence of "some expression by Congress that such results are intended," this Court declined to find a legislative decision to "compromise or abandon[ ] . . . previously articulated policies."

In such circumstances, the silence of the legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979). *See also Sedima*, 741 F.2d at 503-04.

Energy Act, this Court found the legislative history of FWPCA did not contain "the clear indication of legislative intent that we might expect before recognizing such a change in policy."

This narrowing of a statute's scope operates forcefully when private rights are fully protected by an existing statute. Thus, in *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551 (1979), the federal securities laws were held inapplicable to pension plans which were regulated by the more precisely drawn ERISA statute. It was noted that, unlike "the Securities Acts, ERISA deals expressly and in detail with pension plans" and that, in light of the "existence of this comprehensive legislation" it would "serve[ ] no general purpose" to apply the securities laws to pension plans. 439 U.S. at 569-70.

See also Marine Bank v. *Weaver*, 455 U.S. 551, 556-59 (1982), where certificates of deposit were found not to qualify as "securities" within the meaning of the Securities Exchange Act of 1934 because the purchasers of these certificates were "abundantly protected" by the federal banking laws.

Courts are also obligated to read a federal statute narrowly when a broad reading would expand federal jurisdiction in ways not intended by Congress. As stated in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 513 (1940):

> "The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress."

See also Santa Fe Industries, Inc. v. *Green*, 430 U.S. 462, 479 (1977), holding certain causes of action beyond the scope of the federal securities laws, and recognizing that "absent a clear indication of congressional intent," it would be inappropriate "to federalize [a] substantial portion of the law of corporations." *Accord: Cort* v. *Ash*, 422 U.S. 66, 84 (1975).

As explained in *Federal Trade Commission* v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941), "in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background."[12] *See also Sorrells* v. *United States*, 287 U.S. 435, 450 (1932):

> "To construe statutes so as to avoid absurd or glaringly unjust results, foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts. . . . The Congress by legislation can always, if it desires, alter the effect of judicial construction of statutes."[13]

Thus, the Second Circuit was properly sensitive to its obligation to interpret § 1964(c) by looking to the policy of RICO as a whole and avoiding disruption of well established rules of law.

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12 Proponents of broad application of private civil RICO mistakenly rely upon *United States* v. *Turkette*, *supra*, for the proposition that Congress intended to federalize large bodies of state common law when it enacted RICO. A fair reading of *Turkette* shows that it considered only the Congressional intent to "alter somewhat the role of the Federal Government in the war against organized crime." 452 U.S. at 587. *Turkette* did not consider the purpose of private civil RICO.

13 In October 1984, the Chairman of the Senate Judiciary Committee stated:

> "[T]he civil RICO part of title IX [of the Organized Crime Control Act of 1970] was crafted to enhance the protection of legitimate businesses against the syndicate's infiltration by dealing with the organized crime as an economic phenomenon.
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> • • •
>
> [W]hen we acted on this RICO statute as part of the Organized Crime Control Act of 1970, I think it is fair to observe that we might not have envisioned the full use of the statute by private civil litigants to include a civil RICO count in their ordinary business litigation alleging misstatements and fraud." 130 Cong. Rec. 13349-50 (remarks of Sen. Thurmond).

Subsequently, Senator Thurmond commented that RICO had "been perverted by fertile legal minds" and was disrupting the traditional allocation of jurisdiction between the federal and state courts. Daily Report for Executives (BNA), at A-2 (Jan. 9, 1985). *See also* Task Group on Regulation of Financial Services, *Blueprint For Reform* (1984). As relevant here, this report, which was publicly released by Vice President Bush in November 1984, stated (p. 96) that there had been a "flagrant misuse of RICO as a tool of strike [suit] litigation against financial firms with no connection whatsoever to the organized crime activity RICO was designed to deter."

In contrast, the approach of the Seventh Circuit ignores the fact that, without a judicial delineation of appropriate boundaries, the circumstances in which private civil RICO may be applied are limitless. Even though that Court recognized that it did "not seem at all likely that Congress anticipated" RICO would apply to interest rate overcharges, it mistakenly believed that it would constitute "aggressive jurisprudence" to channel the statute in the direction Congress intended. *Haroco* at 392, 399; *see also Sutliff, Inc.* v. *Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984); and *Schacht* v. *Brown*, 711 F.2d 1343, 1361 (7th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 509 (1983). This approach may not, in the circumstances, be viewed as an appropriate exercise of deference to legislative judgment because it fails to recognize the significance of the fact that Congress did not anticipate the application of private civil RICO in the manner in which it is being used.

The recognition of a distinct RICO injury requirement for § 1964(c) would therefore be in accord not only with Congress' intent as to criminal and public civil RICO but also with accepted canons of statutory interpretation.[14]

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14 Proponents of an unlimited reach for private civil RICO rely heavily on § 904 of the Organized Crime Control Act, which provides that it "shall be liberally construed to effectuate its remedial purposes." However, that provision cannot be used to distort the statute or to absolve the courts of their obligation to look at "Congress' intent when it passed the legislation" instead of making "unverifiable guesses as to what its intent would be" in procedural and factual contexts which were not contemplated. *Aetna Casualty and Surety Co.* v. *Liebowitz*, 730 F.2d 905, 908-09 (2d Cir. 1984).

III

MISGUIDED APPLICATION OF PRIVATE CIVIL RICO WOULD UNDERMINE STATUTORY AND JUDICIAL PRINCIPLES APPLICABLE TO CLAIMS INVOLVING PARTICIPANTS IN THE SECURITIES MARKETS

The compelling need for a distinct RICO injury requirement is demonstrated with particular force when claims under § 1964(c) are asserted in areas pervasively regulated by federal statutes. Adjudication of such claims could substantially disrupt the functioning of statutes applicable to creditors' rights, pension benefits, and banking, commodities and securities transactions. This problem will be illustrated by reference to the potential effects of private civil RICO on securities litigation.[15]

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15 Two RICO provisions—§§ 1961(1)(D) and 1962(a)—make specific references to securities. Neither contains any indication that Congress intended that RICO displace the federal securities laws.

Section 1961(1)(D) includes "fraud in the sale of securities" in the list of predicate offenses. This provision was added in the Senate only because of a concern that members of organized crime were infiltrating the securities markets and creating a danger of organized theft or counterfeiting of securities, use of stolen securities as collateral for bank loans and manipulation of large blocks by criminal elements. *Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 154, 227 (1969); *see also Organized Crime Control: Hearings on S.30, and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. 106 (1970); McClellan, *The Organized Crime Act (S. 30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law. 55, 143 (1970) (quoting testimony of J. Edgar Hoover).

Section 1962(a), which declares unlawful the use of funds derived from a pattern of racketeering activity "in acquisition of any interest in, or the establishment or operation" of certain enterprises, is, by its terms, inapplicable to a "purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer," unless more than 1% of the outstanding securities are acquired. This "1% exception" was added at the suggestion of the Department of Justice. The reference to securities in defining activities beyond the scope of RICO obviously cannot support a broad application of § 1964(c) to securities transactions.

Participants in the securities markets are subject to numerous tiers of regulatory authority. At the apex is the Securities and Exchange Commission, whose enforcement arm has powers to seek injunctive relief, as well as criminal and civil penalties. Participants are also policed administratively by the various securities exchanges, by the National Association of Securities Dealers, and by regulatory authorities in virtually every state. In addition, they are subject to civil suit for violations of federal and state securities laws as well as for claims based upon common-law principles.

For more than fifty years, courts have paid meticulous attention to the operative provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as other applicable statutes, and have formulated a comprehensive body of law regarding the elements of private claims for relief. Careful scrutiny has been paid to such matters as standing, culpability, causation, reliance and materiality, as well as to the definitions of "securities" and of "fraud".

Furthermore, courts have devoted substantial attention to the interrelationship of the various statutory and regulatory provisions and to the question whether a particular provision can be enforced by private parties. The issues determined have required, among other things, attention to the specific language of the statute, to Congress' intent in enacting it and to the public purpose which it serves.

As indicated by the following decisions, issued since *Sedima* was decided, private parties are including claims under § 1964(c) in complaints which already contain—or could contain—claims under the federal securities laws:

(i) churning [*Aliberti* v. *E.F. Hutton & Co.*, 591 F. Supp. 632 (D. Mass. 1984) (motion to add RICO claim denied; civil remedies available under the securities laws); *Grey* v. *Gruntal & Co.*, 84 Civ. 5036 (S.D.N.Y. Dec. 14, 1984) (RICO claim dismissed because no criminal conviction, as required by *Sedima*, and no allegation of distinct RICO injury); *Lopez* v. *Dean Witter Reynolds, Inc.*, 591 F. Supp. 581 (N.D. Cal. 1984)

(leave to amend granted, but no RICO standing if injury only from predicate acts and unless brokerage house organized solely for criminal purposes); *Perritt* v. *Merrill Lynch, Pierce, Fenner & Smith*, 83 C 8557 (N.D. Ill. Jan. 9, 1985) (refusal to dismiss RICO claim, relying on *Haroco*)];

(ii) insider trading [*O'Connor & Associates* v. *Dean Witter Reynolds, Inc.*, 600 F. Supp. 702 (S.D.N.Y. 1985) (RICO claim dismissed, relying on *Sedima* and *Bankers Trust*)];

(iii) sale of worthless bonds or notes [*Sheftelman* v. *Jones*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,928 (N.D. Ga. Dec. 26, 1984) (RICO claim dismissed for "failure to make clear the criminal nature of the acts alleged"); *Taylor* v. *Bilezikian*, 84-883 Civ-T-10 (M.D. Fla. Dec. 11, 1984) (RICO claim dismissed, relying on *Sedima*); *Banowitz* v. *State Exchange Bank*, 600 F. Supp. 1466 (N.D. Ill. 1985) (refusal to dismiss RICO claim, relying on *Haroco*)];

(iv) embezzlement from customer accounts (*Bennett* v. *E.F. Hutton Co.*, C83-1502A (N.D. Ohio Nov. 28, 1984) (RICO claim dismissed for pleading insufficiency)];

(v) market manipulation [*Rooney Pace, Inc.* v. *Reid*, 84 Civ. 0471 (S.D.N.Y. Mar. 22, 1985) (RICO claim dismissed, relying on *Sedima*); *Atlantic Federal Savings & Loan Ass'n* v. *Dade Savings & Loan Ass'n*, 592 F. Supp. 1089 (S.D. Fla. 1984) (RICO claim dismissed, relying on *Sedima*)].

Nothing in these decisions indicates that plaintiffs had made allegations of systematic criminal activity or of injury different in kind from that arising from the underlying predicate acts. Rather, they join RICO claims to traditional securities claims in the hope of obtaining greater damages and attorneys' fees.

The impropriety of allowing RICO claims in securities litigation without allegations of a distinct RICO injury may be illustrated by two examples:

1. A well recognized prerequisite to standing under section 10(b) of the Securities Exchange Act of 1934 is an allegation of

fraud in connection with the purchase or sale of a security. The recognition of this prerequisite is grounded both in statutory language and in policy concepts. Under the view of private civil RICO accepted by the Seventh Circuit, shareholders could assert claims in factual situations barred by *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1975). For example, a customer who refrained from selling a security during a period when its market price was declining could allege that, on two occasions, his broker recommended by telephone that the security not be sold. Similar claims could be asserted by shareholders alleging that, in reliance on statements sent by the issuer through the mails, they refrained from selling the issuer's shares during a period when its market price was declining.[16]

2. Pursuant to 15 U.S.C. § 78bb(a), recovery by private parties under the Securities Exchange Act of 1934 is limited to actual damages. But, by the addition of a RICO claim, a plaintiff could, by that device alone, seek to recover potential treble damages as well as attorneys' fees. Furthermore, if the complaint were certified for class action status, the possible economic consequences could be so ruinous that a defendant might "find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).

As shown above, Congress gave no indication that it intended to authorize the disruptions which would stem from an expansive application of private civil RICO to all participants in the securities markets. While the punitive purpose of RICO might well justify some of these anomalies in appropriate cases, there is no basis in logic, policy or the legislative record for allowing § 1964(c) to support claims arising from securities transactions in the absence of a distinct RICO injury.

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16 And, as noted in *Sedima*, 741 F.2d at 499, "two misstatements in a proxy solicitation could subject any director in any national corporation to 'racketeering' charges and the threat of treble damages and attorneys' fees."

Recognition that such an injury is required would not constitute "aggressive jurisprudence." Rather, as *Sedima* correctly acknowledged (741 F.2d at 503-04), courts should not

> "impute to Congress the intention of . . . altogether replacing or eliminating much of the need for extensive bodies of federal law specifically directed at extensively considered evils, [without] explicit language from Congress indicative of such intent."

Because they fail to allege a distinct RICO injury, the *Sedima* and *Haroco* claims should be viewed as beyond the scope of § 1964(c). But in the event this Court holds that these particular plaintiffs have succeeded in stating private civil RICO claims it should carefully limit its holding so that § 1964(c) is not rendered applicable to claims otherwise subject to adjudication under pervasive federal legislation such as the securities laws. A limitation of that nature would ensure that well recognized federal statutory principles are not disturbed in the absence of a clear direction from Congress.

CONCLUSION

For the foregoing reasons, the decision of the Second Circuit should be affirmed.

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